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First report on subsequent agreements and subsequent practice in relation to treaty interpretation

by Georg Nolte, Special Rapporteur

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I. Introduction and previous work of the Commission

1. During its sixty-fourth session, at its 3136th meeting on 31 May 2012, the Commission decided to change the format of work on the topic "Treaties over time" and to appoint Georg Nolte as Special Rapporteur* for the topic "Subsequent agreements and subsequent practice in relation to the interpretation of treaties".[1] The present report builds upon and continues the previous work of the Commission on "Treaties over time".

2. The topic "Treaties over time" was included in the Commission's programme of work at its sixtieth session (2008).[2] At its sixty-first session (2009), the Commission established a Study Group on Treaties over time, chaired by Mr. Nolte.[3] At the sixty-second session (2010), the study group began its work on the aspects of the topic relating to subsequent agreements and practice, on the basis of an introductory report prepared by its Chair on the relevant jurisprudence of the International Court of Justice and arbitral tribunals of ad hoc jurisdiction.[4] At the sixty-third session (2011), the Study Group began its consideration of the second report by the Chair on the jurisprudence under special regimes relating to subsequent agreements and subsequent practice, focusing on 12 of the general conclusions proposed therein.[5] In the light of the discussions in the Study Group, the Chair reformulated the text of his proposed conclusions to what became nine preliminary conclusions.[6]

3. At the sixty-fourth session (2012), the Study Group completed its consideration of the second report by its Chair.[7] In so doing, the Study Group examined six additional general conclusions proposed in the second report. In the light of the discussions in the Study Group, the Chair reformulated the text of what became six additional preliminary conclusions.[8] The Study Group agreed that the preliminary conclusions by its Chair would be revisited and expanded in the light of future reports of the newly appointed Special Rapporteur.[9] In addition to considering the remainder of the second report, the Study Group also considered parts of the third report prepared by its Chair on subsequent agreements and subsequent practice of States outside of judicial and quasi-judicial proceedings.[10]

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[1] A/67/10, para. 269.

[2] A/63/10, para. 353; for the syllabus of the topic, see ibid., annex A. The General Assembly, in paragraph 6 of its resolution 63/123, took note of the decision.

[3] A/64/10, paras. 220-226.

[4] A/65/10, paras. 344-354. The introductory, second and third reports, originally informal working papers, will be included in the forthcoming publication, Georg Nolte (ed.) *Treaties and Subsequent Practice* (Oxford University Press, 2013).

[5] A/66/10, paras. 336-341.

[6] For the text of the nine preliminary conclusions by the Chair of the Study Group, see ibid., para. 344.

[7] A/67/10, paras. 225-239.

[8] For the text of the six additional preliminary conclusions by the Chair of the Study Group, see ibid., para. 240.

[9] Ibid., para. 231.

[10] Ibid., paras. 232-234.

II. Scope, aim and possible outcome of the work

4. The original purpose for the Commission to pursue work on the topic "Treaties over time" within the format of a Study Group had been to give the members the opportunity to consider whether the topic should be approached with a broad focus, which would have also involved, inter alia, an in-depth treatment of the termination and the formal amendment of treaties, or whether the topic should be limited to a narrower focus on the aspect of subsequent agreements and subsequent practice. The discussions within the Study Group have led to the agreement, in accordance with the view originally expressed by the Chair, that it would be preferable to limit the topic to the narrower aspect of the legal significance of subsequent agreements and practice. The Study Group ultimately agreed that the main focus of the future work would be on the legal significance of subsequent agreements and subsequent practice for interpretation (Vienna Convention on the Law of Treaties, article 31) and related aspects,[11] as explained in the original proposal for the topic.[12] According to the original proposal, these means of interpretation are important because of their function with regard to the interpretation of treaties over time:

> As important treaties reach a certain age, in particular law-making treaties of the post-1945 era, the context in which they operate becomes different from the one in which they were conceived. As a result, it becomes more likely that some of these treaties' provisions will be subject to efforts of reinterpretation, and possibly even of informal modification. This may concern technical rules as well as more general substantive rules. As their context evolves, treaties face the danger of either being "frozen" into a state in which they are less capable of fulfilling their object and purpose, or of losing their foundation in the agreement of the parties. The parties to a treaty normally wish to preserve their agreement, albeit in a manner which conforms to present-day exigencies. Subsequent agreement and subsequent practice aim at finding a flexible approach to treaty application and interpretation, one that is at the same time rational and predictable.[13]

5. The present report, in accordance with the discussions in the Study Group on Treaties over time at the Commission's sixty-fourth session (2012), synthesizes elements of the three reports of the Study Group[14] and takes into account the discussions within that Group. It contains four proposed draft conclusions, explained by commentaries, which cover some basic aspects of the topic. Due to certain constraints, in particular space constraints, it has not been possible to synthesize the entirety of the three reports for the Study Group into the present report. However, the Special Rapporteur is confident that it will be possible to synthesize the remainder of those reports in a further report which will cover other and more specific aspects of the topic. He envisages that the work on the topic will be finalized, as foreseen, within the current quinquennium (see the programme of work in chapter VII below).

6. The aim of the discussion on the present topic is to examine the role which subsequent agreements and subsequent practice play in the interpretation of treaties,

[11] Ibid., para. 238.
[12] A/63/10, annex A, paras. 11ff.
[13] Ibid., para. 14.
[14] See footnotes 4, 5 and 10.

and to give, thereby, some orientation to those who interpret or apply treaties. This group includes judges (at the international and the national levels), officials of States and international organizations, academics and other private actors. The materials and analyses which are contained in the present and in the future reports, as well as the conclusions of the Commission, should provide a common reference and thereby contribute, as far as possible and reasonable, to a common and uniform approach to the interpretation and application of a particular treaty. The present report is based primarily on the jurisprudence of a, hopefully, representative group of international courts, tribunals and other adjudicative bodies,[15] as well as on documented instances of State practice. Together this collection is an element, necessarily incomplete, of a repertory of practice. As it is formulated in the original proposal for the topic of Treaties over time:

> The (...) goal of the consideration of the topic should be to derive some general conclusions or guidelines from the repertory of practice. Such conclusions or guidelines should not result in a Draft Convention, if only for the reason that guidelines to interpretation are hardly ever codified even in domestic legal systems. Such general conclusions or guidelines could, however, give those who interpret and apply treaties an orientation for the possibilities and limits of an increasingly important means of interpretation that is specific to international law. These conclusions, or guidelines, would neither provide a straightjacket for the interpreters, nor would they leave them in a void. They would provide a reference point for all those who interpret and apply treaties, and thereby contribute to a common background understanding, minimizing possible conflicts and making the interpretive process more efficient.[16]

7. The delineation of the present topic from other topics is reasonably clear. One topic which might raise questions in this respect is "Formation and evidence of customary international law". In this respect, the Special Rapporteur is in agreement with the opinion of Sir Michael Wood, Special Rapporteur on the topic of "Formation and evidence of customary international law", that, while the effect of treaties on the formation of customary international law is part of that topic, the role of customary international law in the interpretation of treaties is part of the present topic. Needless to say, the topic does not concern the determination of the content of particular treaty rules, but is, rather focused on the elucidation of the role and possible effects of subsequent agreements and subsequent practice in relation to treaty interpretation. Another topic which could have points of contact is "Provisional application of treaties". The focus of this topic does not, however, seem to be on the effect of provisional application on the interpretation of a treaty.[17]

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[15] The term jurisprudence is used in the sense of legal assessments in individual cases by competent adjudicatory bodies which are composed of independent members. Such legal assessments are not limited to binding judgments by international courts or tribunals, but also include "views" by the Human Rights Committee under the International Covenant on Civil and Political Rights and reports by the Panels and the Appellate Body under the World Trade Organization (WTO) Dispute Settlement Body. The report covers only pronouncements by adjudicatory bodies which concentrate on legal (not factual) assessments, which are sufficiently accessible and which have already generated a significant number of decisions.

[16] A/63/10, annex A, para. 22.

[17] A/67/10, paras. 144-155.

III. General rule and means of treaty interpretation

8. The legal significance of subsequent agreements and subsequent practice for the interpretation of treaties depends, as a point of departure, on the general rule regarding treaty interpretation. This general rule, consisting of different sub-rules or elements, is codified in article 31 of the Vienna Convention on the Law of Treaties, which was adopted on 23 May 1969 and entered into force on 27 January 1980.[18] The International Court of Justice (ICJ) has recognized that this general rule on treaty interpretation reflects customary international law.[19] Together with article 32, article 31 of the Convention lists a number of relevant "means of interpretation"[20] (among them "subsequent agreement" and "subsequent practice" as "authentic means of interpretation"[21]) which shall be taken into account in the process of interpretation.

9. It is generally recognized that article 31 of the Vienna Convention must not "be taken as laying down a hierarchical order" of the different means of interpretation contained therein, but that these are to be applied by way of "a single combined operation".[22] Thus, the application of the general rule on treaty interpretation to different treaties, or treaty provisions, in a specific case may result in a different emphasis on the various means of interpretation contained therein, in particular in more or less emphasis on the text of the treaty or on its object and purpose. This is confirmed by the jurisprudence of various representative international adjudicatory bodies:

1. International Court of Justice

10. After an initial period of hesitation,[23] ICJ began to refer to articles 31 and 32 of the Vienna Convention in the 1990s.[24] Since then the Court routinely bases its treaty interpretation on the general rule and the other means of interpretation according to articles 31 and 32 of the Vienna Convention.[25] The Court also typically reaffirms their customary nature, allowing the Court to apply the rules contained therein in cases where one or more parties to the dispute are not parties to the

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[18] Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980), United Nations, *Treaty Series*, vol. 1155, No. 18232.

[19] *Dispute regarding Navigational and Related Rights (Costa Rica v. Nicaragua)* (Judgment) [2009] *I.C.J. Reports 2009*, p. 213, para. 47; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)* (Judgment) [2007] *I.C.J. Reports 2007*, p. 43, para. 160.

[20] Vienna Convention on the Law of Treaties, article 32, *Yearbook of the International Law Commission* (1966), vol. II, pp. 218-223, paras. 2, 5, 8, 10, 15, 18, 19.

[21] Ibid., p. 222, para. 15; see sect. IV below, paras. 30 and 64 (draft conclusion 2).

[22] Ibid., p. 219, para. 8.

[23] On the different periods of reception of the Vienna rules by ICJ, see S. Torres Bernárdez, "Interpretation of Treaties by the International Court of Justice following the Adoption of the 1969 Vienna Convention on the Law of Treaties", in G. Hafner and others (eds.), *Liber Amicorum: Professor Ign az Seidl-Hohenveldern (in honour of his 80th birthday)* (Kluwer Law International, 1998), p. 721; see also R. Gardiner, *Treaty Interpretation* (Oxford University Press, 2010), pp. 12ff.

[24] *Arbitral Award of July 1989 (Guinea-Bissau v. Senegal)* (Judgment) [1991], *I.C.J. Reports 1991*, p. 53, para. 48; *Land, Island and Maritime Frontier Dispute (El Salvador v. Honduras, Nicaragua intervening)* [1992], *I.C.J. Reports 1992*, p. 351, paras. 373 and 376.

[25] For a recent case, see *Application of the Interim Accord of 13 September 1995 (the Former Yugoslav Republic of Macedonia v. Greece)* (Judgment) [5 December 2011], para. 91 (http://www.icj-cij.org/docket/files/142/16827.pdf, accessed 7 March 2013).

Vienna Convention, as well as in relation to treaties concluded before its entry into force in 1980.[26]

2. Adjudicative bodies under international economic regimes

11. The World Trade Organization (WTO) Appellate Body bases its practice of treaty interpretation on articles 31 and 32 of the Vienna Convention.[27] Panels and the Appellate Body typically concentrate on the text of the respective agreement.[28] So far the Appellate Body has not put a particular emphasis on the object and purpose as a means of interpretation.[29] It has only occasionally resorted to an evolutive interpretation[30] or applied the principle of effectiveness in order to avoid "reducing whole clauses or paragraphs of a treaty to redundancy or inutility".[31]

12. The Iran-United States Claims Tribunal has also recognized the rules of interpretation as they are enunciated in articles 31 and 32 of the Vienna Convention.[32] In its jurisprudence it has primarily relied on the ordinary meaning of the terms in question and on their object and purpose.[33] Thus, the Tribunal is

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[26] *Dispute Regarding Navigational and Related Rights (Costa Rica v. Nicaragua)* (see footnote 19); *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)* (see footnote 19); *Legal Consequences of the Construction of a Wall in Occupied Palestinian Territory* (Advisory Opinion) [2004], *I.C.J. Reports 2004*, p. 136, para. 94; *Avena and Other Mexican Nationals (Mexico v. United States of America)* (Judgment) [2004], *I.C.J. Reports 2004*, p. 12, para. 83; *Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia v. Malaysia)* (Judgment) [2002], *I.C.J. Reports 2002*, p. 625, para. 37; *LaGrand (Germany v. United States of America)* (Judgment) [2001], *I.C.J. Reports 2001*, p. 466, para. 99; *Pulp Mills on the River Uruguay (Argentina v. Uruguay)* (Judgment) [2010], *I.C.J. Reports 2010*, p. 14, para. 65 (Vienna Convention, article 31); *Kasikili/Sedudu Island (Botswana v. Namibia)* (Judgment) [1999], *I.C.J. Reports 1999*, p. 1045, para. 18 (Vienna Convention, article 31); *Territorial Dispute (Libyan Arab Jamahiriya v. Chad)* (Judgment) [1994], *I.C.J. Reports 1994*, p. 6, para. 41, without expressly mentioning article 32, but referring to the supplementary means of interpretation.

[27] Georges Abi-Saab, "The Appellate Body and Treaty Interpretation" in Malgosia Fitzmaurice, Olufemi Elias and Panos Merkouris (eds.) *Treaty Interpretation and the Vienna Convention on the Law of Treaties* (Martinus Nijhoff, 2010), pp. 99-109.

[28] WTO, *Brazil: Export Financing Programme for Aircraft*, recourse by Canada to article 21.5 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU), Report of the Appellate Body (21 July 2000) (WT/DS46/AB/RW, para. 45).

[29] Donald McRae, "Approaches to the Interpretation of Treaties: The European Court of Human Rights and the WTO Appellate Body", in Stephan Breitenmoser, Luzius Wildhaber et al. (eds.) *Human Rights, Democracy and the Rule of Law* (Dike, 2007), pp. 1407-1422.

[30] WTO, *United States: Import Prohibition of Certain Shrimp and Shrimp Products*, Report of the Appellate Body (12 October 1998) (WT/DS58/AB/R, para. 130).

[31] WTO, *Japan: Alcoholic Beverages II*, Report of the Appellate Body (4 October 1996) (WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, at sect. D).

[32] George Aldrich, *The Jurisprudence of the Iran-United States Claims Tribunal* (Clarendon Press, 1996), p. 361, citing *Case A/1 (Issues I, III and IV), Decision No. DEC 12-A1-FT* (1982) 1 Iran-USCTR, p. 189, paras. 190-192.

[33] Ibid., paras. 362-365.

following a rather balanced interpretative approach which does not put particular emphasis on one particular means of interpretation.[34]

13. Tribunals established by the International Centre for Settlement of Investment Disputes (ICSID) under the Convention on the Settlement of Investment Disputes between States and Nationals of Other States have also recognized that they must apply articles 31 and 32 of the Vienna Convention either as treaty law or as customary law.[35] They regularly invoke jurisprudence of ICJ, the former Permanent Court of International Justice and arbitral tribunals, and they thereby place their reasoning within the context of general international law.[36] Although their jurisprudence is far from following a uniform approach, the ICSID tribunals have, so far, neither put a conspicuous emphasis on the object and purpose as a means of interpretation nor on the presumed intentions of the parties to the Convention when they concluded it.[37]

14. The general approach to interpretation by Panels under the North American Free Trade Agreement (NAFTA) can be described as proceeding from the Vienna Convention rules on interpretation, with an emphasis on trade liberalization as the main object and purpose of the Agreement.[38]

3. Human rights courts and the Human Rights Committee

15. The European Court of Human Rights, in the early case of *Golder v. the United Kingdom*,[39] has considered "that it should be guided by articles 31 to 33 of the Vienna Convention"[40] and has reiterated the explanation given by ILC for the process of interpretation under the Convention:

> In the way in which it is presented in the "general rule" in Article 31 of the Vienna Convention, the process of interpretation of a treaty is a unity, a single

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[34] Karl-Heinz Bockstiegel, "Zur Auslegung völkerrechtlicher Verträge durch das Iran-United States Claims Tribunal", in Kay Hailbronner (ed.), *Staat und Völkerrechtsordnung. Festschrift für Karl Doehring* (Springer 1989), pp. 119-131; George Aldrich (see footnote 32), pp. 360ff; Charles Brower and Jason Brueschke, *The Iran-United States Claims Tribunal* (Martinus Nijhoff, 1998), pp. 263ff.

[35] Christoph Schreuer, "Diversity and Harmonization of Treaty Interpretation in Investment Arbitration", in Malgosia Fitzmaurice, Olufemi Elias and Panos Merkouris (eds.) *Treaty Interpretation and the Vienna Convention on the Law of Treaties* (Martinus Nijhoff, 2010), pp. 129ff; Ole Kristian Fauchald, "The Legal Reasoning of ICSID Tribunals — An Empirical Analysis" (2008), European Journal of International Law, Issue vol. 19, p. 314; Romesh J. Weeramantry, *Treaty Interpretation in Investment Arbitration* (Oxford University Press, 2012).

[36] Fauchald (see footnote 35), pp. 311, 313 and 341.

[37] Ibid., pp. 315-319.

[38] *Tariffs Applied by Canada to Certain US-Origin Agricultural Products* (Final Report of the Panel) Arbitral Panel Established Pursuant to article 2008, Secretariat File No. CDA-95-2008-01 (2 December 1996), paras. 118 and 119 (http://registry.nafta-sec-alena.org/cmdocuments/0c7973b9-1088-4221-99a5-e279075380b0.pdf, accessed 16 January 2013); see also for Chapter 11 Panels, *Canadian Cattlemen for Fair Trade (CCFT) v. United States of America* (Award on Jurisdiction), United Nations Commission on International Trade Law (UNCITRAL) Arbitration under the North American Free Trade Agreement, chapter eleven (28 January 2008), paras. 45-48 and 122 (http://www.naftaclaims.com/Disputes/USA/CCFT/CCFT-USA-Award.pdf, accessed 16 January 2013).

[39] *Golder v. the United Kingdom* (1975), European Court of Human Rights, Series A, No. 18.

[40] Ibid.

> combined operation; this rule, closely integrated, places on the same footing the various elements enumerated in the four paragraphs of the Article.[41]

16. Since then, the Court has regularly reconfirmed its attachment, in principle, to articles 31 to 33 of the Vienna Convention as the basis for interpreting the European Convention on Human Rights.[42] The Court, however, distinguishes the European Convention from "international treaties of the classic kind".[43] According to the Court:

> the Convention comprises more than mere reciprocal engagements between Contracting States. It creates, over and above a network of mutual, bilateral undertakings, objective obligations which, in the words of the Preamble benefit from a "collective enforcement.[44]

17. The interpretation of the Convention would therefore have to take into account the "effectiveness of the Convention as a constitutional instrument of European public order (*ordre public*)".[45] The identification of these characteristics of the Convention has contributed to the recognition by the Court "that the Convention is a living instrument which must be interpreted in the light of present-day conditions".[46] This "living instrument" approach is not, however, an exception to the general method of interpretation on the basis of articles 31 to 33 of the Vienna Convention. Indeed, the European Court of Human Rights has regularly reiterated "that the Convention must be interpreted in the light of the rules set out in the Vienna Convention of 23 May 1969 on the Law of Treaties" and that it "must determine the responsibility of the States in accordance with the principles of international law governing this sphere, while taking into account the special nature of the Convention as an instrument of human rights protection".[47]

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[41] *Golder* (see footnote 39), para. 30; for the wording of ILC, see *Yearbook of the International Law Commission* (1966), vol. II, p. 219, para. 8.

[42] *Mamatkulov and Askarov v. Turkey* [GC] ECHR 2005-I, paras. 111 and 123; *Bankovic and others v. Belgium and 16 Other Contracting States* (dec) [GC] ECHR 2001-XII, paras. 55-58; *Al-Adsani v. the United Kingdom* [GC] ECHR 2001-XI, para. 55; *Loizidou v. Turkey* (Preliminary Objections) (1995), Series A, No. 310, para. 73; *Cruz Varas and others v. Sweden* (1991), Series A, No. 201, para. 100; *Johnston and others v. Ireland* (1985), Series A, No. 112, para. 51; *Al-Saadoon and Mufdhi v. the United Kingdom*, Application No. 61498/08 (European Court of Human Rights, 2 March 2010), para. 126; *Rantsev v. Cyprus and Russia*, Application No. 25965/04 (European Court of Human Rights, 7 January 2010), paras. 273-274, selected for publication in Reports of Judgments and Decisions; *Demir and Baykara v. Turkey* [GC] Application No. 34503/97 (European Court of Human Rights, 12 November 2008), para. 65, selected for publication in Reports of Judgments and Decisions.

[43] *Ireland v. the United Kingdom* (1978), European Court of Human Rights, Series A, No. 25, para. 239; *Al-Saadoon and Mufdhi* (see footnote 42), para. 127; *Soering v. the United Kingdom* (1989), European Court of Human Rights, Series A, No. 161, para. 87.

[44] *Ireland* (see footnote 43), para. 239.

[45] *Loizidou* (see footnote 42), para. 75.

[46] *Tyrer v. the United Kingdom* (1978), European Court of Human Rights, Series A, No. 26, para. 31; *Al-Saadoon and Mufdhi* (see footnote 42), para. 119, quoting *Öcalan v. Turkey* [GC] ECHR 2005-IV, para. 163; *Selmouni v. France* [GC] ECHR 1999-V, para. 101.

[47] *Mamatkulov and Askarov* (see footnote 42), para. 111; see also *Al-Saadoon and Mufdhi* (see footnote 42), para. 119; *Al-Adsani* (see footnote 42), para. 55, *Loizidou* (see footnote 42), para. 43; and *Bayatyan v. Armenia* [GC], Application No. 23459/03 (European Court of Human Rights, 7 July 2011), paras. 98-108.

18. In a similar vein, the Inter-American Court of Human Rights acknowledges that, according to the Vienna Convention:

> ... the process of interpretation should be taken as a whole.[48]

19. Although the Court usually begins its reasoning by looking at the text,[49] it has, in general, not relied on a primarily textual approach but rather resorted to other means of interpretation.[50] The Court's reluctance to assign a more prominent role to a provision's ordinary meaning is ultimately the consequence of the Court's emphasis on object and purpose.[51] Thus, the Court stressed that

> ... the "ordinary meaning" of terms cannot of itself become the sole rule, for it must always be considered within its context and, in particular, in the light of the object and purpose of the treaty.[52]

20. In the Inter-American Court's jurisprudence the "object and purpose" appears to play the most important role among the different means of interpretation. A characteristic feature of this Court's object and purpose-based approach is its emphasis on the overriding aim of the Convention as a whole to effectively protect human rights. According to the Court,

> ... when interpreting [the] Convention the Court must do it in such a way that the system for the protection of human rights has all its appropriate effects (*effet utile*).[53]

21. The Human Rights Committee has recognized the Vienna Convention rules on interpretation[54] but applies them mostly by implication. In its jurisprudence, the "object and purpose" of the International Covenant on Civil and Political Rights has played the most important role among the various means of interpretation which are referred to in articles 31 and 32 Vienna Convention.[55] One important aspect of the Human Rights Committee's interpretative approach is its evolutive understanding of

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[48] *"White Van" (Paniagua-Morales and others v. Guatemala)* (Preliminary Objections, Judgment), Inter-American Court of Human Rights, Series C, No. 23 (25 January 1996), para. 49.

[49] *The Effect of Reservations on the Entry into Force of the American Convention on Human Rights (Articles 74 and 75)*, Advisory Opinion OC-2/82, Inter-American Court of Human Rights, Series A, No. 2 (24 September 1982), para. 19; *Enforceability of the Right to Reply or Correction (Articles 14(1) 1(1) and 2, American Convention on Human Rights)*, Advisory Opinion OC-7/86, Inter-American Court of Human Rights, Series A, No. 7 (29 August 1986).

[50] *The Effect of Reservations* (see footnote 49), para. 19; *González and others ("Cotton Field") v. Mexico* (Preliminary Objection, Merits, Reparations and Costs, Judgment), Inter-American Court of Human Rights, Series C, No. 205 (16 November 2009), para. 29.

[51] Lucas Lixinski, "Treaty Interpretation by the Inter-American Court of Human Rights" (2010), European Journal of International Law, Issue vol. 21, pp. 587 and 588.

[52] *Proposed Amendments of the Naturalization Provisions of the Constitution of Costa Rica*, Advisory Opinion OC-4/84, Inter-American Court of Human Rights, Series A, No. 4 (19 January 1984), para. 23; *Article 55 of the American Convention on Human Rights*, Advisory Opinion OC-20/09, Inter-American Court of Human Rights, Series A, No. 20 (29 September 2009), para. 26.

[53] *The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law*, Advisory Opinion OC-16/99, Inter-American Court of Human Rights, Series A, No. 16 (1 October 1999), para. 58.

[54] *Alberta Union v. Canada* (18 July 1986), Communication No. 118/1982 (CCPR/C/28/D/118/1982), para. 6.3.

[55] *Setelich v. Uruguay* (28 October 1981), Communication No. 63/1979 (CCPR/C/14/63/1979), paras. 11, 14 and 18.

the rights of the Covenant. For example, in the case of *Yoon and Choi v. the Republic of Korea*,[56] the Committee stressed that any right contained in the Covenant evolved over time,[57] and by this reasoning justified a certain departure from its own prior jurisprudence.[58] However, in the case of *Atasoy and Sarkut v. Turkey*, the Committee has emphasized that evolutive interpretation "cannot go beyond the letter and spirit of the treaty or what the States parties initially and explicitly so intended".[59]

4. Other international adjudicative bodies

22. Other international adjudicative bodies have also recognized that the Vienna Convention articulates the basic rules on the interpretation of treaties.

23. The Seabed Disputes Chamber has outlined the importance of the Vienna Convention for the International Tribunal for the Law of the Sea (ITLOS) in its Advisory Opinion on the *responsibilities and obligations of States sponsoring persons and entities with respect to activities in the Area*:

> Among the rules of international law that the Chamber is bound to apply, those concerning the interpretation of treaties play a particularly important role. The applicable rules are set out in Part III, Section 3, entitled "Interpretation of Treaties" and comprising articles 31 to 33 of the 1969 Vienna Convention on the Law of Treaties (...). These rules are to be considered as reflecting customary international law. Although the Tribunal has never stated this view explicitly, it has done so implicitly by borrowing the terminology and approach of the Vienna Convention's articles on interpretation (see the Tribunal's Judgment of 23 December 2002 in the "*Volga*" Case (...)[60]

24. On occasion the International Tribunal has shown its readiness to employ a dynamic and evolutive approach to interpretation. Thus, the Seabed Disputes Chamber has characterized certain "obligations to ensure"[61] as due diligence obligations[62] which were "variable concepts" and which "may change over time as measures considered sufficiently diligent at a certain moment may be come not diligent enough in light, for instance, of new scientific or technological knowledge".[63] Thus, where appropriate, the Tribunal seems to be prepared to interpret the United Nations Convention on the Law of the Sea in an evolutive and dynamic manner on the basis of the Vienna Convention, presumably as a feature of the object and purpose of the provision.

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[56] *Yoon and Choi v. the Republic of Korea* (3 November 2006), Communication Nos. 1321/2004 and 1322/2004 (CCPR/C/88/D/1321-1322/2004).

[57] *Yoon and Choi* (see footnote 56), para. 8.2.

[58] *LTK v. Finland* (9 July 1985), Communication No. 185/1984 (CCPR/C/25/D/185/1984), para. 5.2.

[59] *Atasoy and Sarkut v. Turkey* (29 March 2012), Communication Nos. 1853/2008 and 1854/2008, (CCPR/C/104/D/1853-1854/2008), para. 7.13.

[60] *Responsibilities and obligations of States sponsoring persons and entities with respect to activities in the Area (Advisory Opinion of 1 February 2011)*, ITLOS, Case No. 17, paras. 57 and 58.

[61] United Nations Convention on the Law of the Sea (adopted 10 December 1982, entered into force 16 November 1994), United Nations, *Treaty Series*, vol. 1833, No. 31383, article 153(4) and article 4(4) in annex III.

[62] *Responsibilities and Obligations of States*, ITLOS, Case No. 17 (see footnote 60), para. 110.

[63] Ibid., paras. 117 and 211.

25. The International Criminal Court has repeatedly pronounced that, in interpreting its Statute and other applicable treaties, it follows the rules of the Vienna Convention.[64] The International Tribunal for the Former Yugoslavia has also stated on several occasions that the Vienna Convention rules are applicable to the interpretation of treaties.[65]

26. The European Court of Justice treats the rules of the founding treaties ("primary Union law") as constituting an "autonomous legal order" and accordingly does not refer to the Vienna Convention when interpreting those treaties. In contrast, when the European Court of Justice interprets agreements of the Union with third States it considers itself bound by the rules of customary international law as they are reflected in the rules on interpretation of the Vienna Convention.[66] In *Brita GmbH v. Hauptzollamt Hamburg-Hafen*,[67] the European Court of Justice remarked:

> ... even though the Vienna Convention does not bind either the Community or all its Member States, a series of provisions in that convention reflect the rules of customary international law which, as such, are binding upon the Community institutions and form part of the Community legal order.[68]

and concluded that:

> the rules laid down in the Vienna Convention apply to an agreement concluded between a State and an international organization, such as the EC-Israel Association Agreement, in so far as the rules are an expression of general international customary law.[69]

27. Quoting article 31 of the Vienna Convention, the Court then noted that treaties must not only be interpreted according to their textual meaning, but also in the light of their object and purpose. For example, in a case concerning the draft agreement relating to the creation of the European Economic Area between the Community and the countries of the European Free Trade Association,[70] the Court stressed

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[64] *Lubanga Dyilo* (Decision on the Final System of Disclosure and the Establishment of a Timetable) ICC (Pre-Trial Chamber) (15 May 2006), annex I, para. 1; *Situation in the Democratic Republic of the Congo* (Judgment on the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal), International Criminal Court (Appeals Chamber) (13 July 2006), paras. 6 and 33; *Lubanga Dyilo* (Decision on the Practices of Witness Familiarization and Witness Proofing), ICC (Pre-Trial Chamber) (8 November 2006), para. 8.

[65] See *Jelisić* (Judgment), ICTY-95-10 (14 December 1999), para. 61; *Čelebići* (Judgment) ICTY-96-21 (20 February 2001), paras. 67ff; *Krstić* (Judgment) ICTY-98-33 (2 August 2001), para. 541; *Stakić* (Judgment) ICTY-97-24 (31 July 2003), para. 501; *Galić* (Judgment), ICTY-98-29 (5 December 2003), para. 91.

[66] See Pieter Jan Kuijper, "The Court and the Tribunal of the EC and the Vienna Convention on the Law of Treaties 1969" (1998), *Legal Issues of European Integration*, vol. 25, Issue 1; Case C-344/04, *The Queen on the application of: International Air Transport Association and European Low Fares Airline Association v. Department for Transport* (Preliminary Ruling) (2006), ECR I-403, para. 40.

[67] Case C-386/08, *Brita GmbH v. Hauptzollamt Hamburg-Hafen* (2010), ECR I-01289.

[68] Ibid., para. 42.

[69] Ibid., para. 41; see also Case C-6/60, *Jean-E. Humblet v. Belgian State* (1960), ECR 559, p. 574.

[70] European Court of Justice, Opinion 1/91 (1991), ECR I-6079.

> the fact that the provisions of the agreement and the corresponding Community provision are identically worded does not mean that they must be interpreted identically.[71]

and determined that the meaning of identically worded provisions in the European Free Trade Association Agreement and the European Economic Community Treaty differed.[72]

5. Conclusion: draft conclusion 1

28. Taken together, these sources suggest the following draft conclusion:[73]

Draft conclusion 1
General rule and means of treaty interpretation

Article 31 of the Vienna Convention on the Law of Treaties, as treaty obligation and as reflection of customary international law, sets forth the general rule on the interpretation of treaties.

The interpretation of a treaty in a specific case may result in a different emphasis on the various means of interpretation contained in articles 31 and 32 of the Vienna Convention, in particular on the text of the treaty or on its object and purpose, depending on the treaty or on the treaty provisions concerned.

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[71] Ibid., para. 14.

[72] Ibid., para. 35.

[73] See preliminary conclusions 1 to 3 of the Chair of the Study Group on Treaties over time (A/66/10, para. 344), in particular preliminary conclusion (1) and (2) (first para.):

> **(1) General rule on treaty interpretation**
>
> The provisions contained in Article 31 of the Vienna Convention on the Law of Treaties (VCLT), either as an applicable treaty provision or as a reflection of customary international law, are recognized by the different adjudicatory bodies reviewed as reflecting the general rule on the interpretation of treaties which they apply.
>
> **(2) Approaches to interpretation**
>
> Regardless of their recognition of the general rule set forth in Article 31 VCLT as the basis for the interpretation of treaties, different adjudicatory bodies have in different contexts put more or less emphasis on different means of interpretation contained therein.

IV. Subsequent agreements and subsequent practice as means of interpretation

29. The general rule on the interpretation of treaties recognizes subsequent agreements and subsequent practice of the parties under certain conditions to be among the different means of interpretation (Vienna Convention, article 31 (3) (a) and (b)). The Commission, in its commentary on the draft articles on the Law of Treaties, underlined that

> The importance of such subsequent practice in the application of a treaty, as an element of interpretation, is obvious; for it constitutes objective evidence of the understanding of the parties as to the meaning of the treaty.[74]

30. By considering subsequent agreement and subsequent practice according to articles 31 (3) (a) and (b) of the Vienna Convention to be "objective evidence of the understanding of the Parties", the Commission conceived them as "authentic"[75] means of interpretation. This understanding as an authentic means of interpretation suggests that such subsequent agreements and subsequent practice of the parties are often, but not necessarily always,[76] particularly important factors for the interpretation of treaties.[77]

1. Recognition by international adjudicatory bodies

31. Subsequent agreements and subsequent practice of the parties have been recognized and applied as means of interpretation by international adjudicatory bodies, albeit with somewhat different emphasis.

(a) International Court of Justice

32. The International Court of Justice "has itself frequently examined the subsequent practice of the parties in the application of (..) [a] treaty".[78] Its jurisprudence provides a general orientation and significant examples of the possible legal effects of subsequent agreements and subsequent practice as means of

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[74] *Yearbook of the International Law Commission* (1966), vol. II, p. 221, para. 15.

[75] Ibid.

[76] It has been asserted that the interpretation of treaties which establish rights for other States or actors is less susceptible to "authentic" interpretation by their parties, for example in the context of investment treaties: *Sempra Energy International v. Argentine Republic*, ICSID Case No. ARB/02/16 (28 September 2007), para. 386 (https://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC694_En&caseId=C8, accessed 6 March 2013); *Enron Corporation, Ponderosa Assets, L.P. v. Argentine Republic*, ICSID Case No. ARB/01/3 (22 May 2007), para. 337 (http://italaw.com/documents/Enron-Award.pdf, accessed 6 March 2013).

[77] See Robert Jennings and Arthur Watts (eds.), *Oppenheim's International Law*, vol. 1 (9th edn, Longman, 1992), p. 1268, para. 630; Gerald Fitzmaurice, "The Law and Procedure of the International Court of Justice 1951-4: Treaty Interpretation and Certain other Treaty Points" (1957), British Yearbook of International Law, pp. 223-225; WTO, *United States: Large Civil Aircraft (2nd complaint)*, Report of the Panel (31 March 2011) (WT/DS353/R, para. 7.953).

[78] *Case concerning Kasikili/Sedudu Island (Botswana v. Namibia)* [1999], *I.C.J. Reports 1999*, p. 1076, para. 50; see also Application of the Interim Accord of 13 September 1995 (*The Former Yugoslav Republic of Macedonia v. Greece*) (Judgment) [5 December 2011], para. 99 (see http://www.icj-cij.org/docket/files/142/16827.pdf).

interpretation as well as their interplay with other means of interpretation (see in more detail in sect. 2 below).

(b) Adjudicatory bodies under economic treaty regimes

33. International adjudicatory bodies under economic treaty regimes have frequently addressed subsequent agreements and subsequent practice as means of interpretation. Thus, the WTO Appellate Body has recognized subsequent practice as a means of interpretation and has applied it on several occasions[79] and has also taken a subsequent agreement into account.[80] The same is true for the Iran-United States Claims Tribunal,[81] which has held:

> Hence, far from playing a secondary role in the interpretation of treaties, the subsequent practice of the Parties constitutes an important element in the exercise of interpretation. In interpreting treaty provisions, international tribunals have often examined the subsequent practice of the parties. The Tribunal has also recognized the importance of the subsequent practice of the parties and has referred to it in several cases.[82]

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[79] WTO, *Japan: Alcoholic Beverages*, Report of the Appellate Body (4 October 1996), WT/DS8/AB/R, WT/DS10/AB/R and WT/DS11/AB/R, and sect. E; Report of the Panel (11 July 1996), WT/DS8/R, WT/DS10/R and WT/DS11/R; *European Communities: Chicken Cuts*, Report of the Appellate Body (12 September 2005), WT/DS269/AB/R and WT/DS286/AB/R, para. 259, and Report of the Panel (30 May 2005), WT/DS269/R and WT/DS286/R; *European Communities: Computer Equipment*, Report of the Appellate Body (5 June 1998), WT/DS62/AB/R, WT/DS67/AB/R and WT/DS68/AB/R, paras. 92 and 93, and Report of the Panel (5 February 1998), WT/DS62/R, WT/DS67/R and WT/DS68/R; *United States: Upland Cotton*, Report of the Appellate Body (3 March 2005), WT/DS267/AB/R; Report of the Panel (8 September 2004), WT/DS267/R; see also *European Communities and its Member States: Information Technology Products*, Report of the Panel (16 August 2010), WT/DS375/R, WT/DS376/R and WT/DS377/R, para. 7.558.

[80] WTO, *United States: Tuna II (Mexico), Report of the Appellate Body* (16 May 2012), WT/DS381/AB/R, para. 372.

[81] *The United States of America (and others) and the Islamic Republic of Iran, (and others), Award No. 108-A-16/582/591-FT* (1984) 5 Iran-USCTR 57; *International Schools Services, Inc (ISS) and National Iranian Copper Industries Company (NICICO)*, Interlocutory Award No. ITL 37-111-FT (1984), 5 Iran-USCTR p. 338; *United States-Iran, Case No. A17, Decision No. DEC 37-A17-FT* (1985), 8 Iran-USCTR 189; *Burton Marks (and others) and the Islamic Republic of Iran*, Interlocutory Award No. ITL 53-458-3 (1985), 8 Iran-USCTR 290; *The Islamic Republic of Iran and the United States of America*, Interlocutory Award No. ITL 63-A15(I:G)-FT (1986), 12 Iran-USCTR 40; *The Islamic Republic of Iran and the United States of America — Partial Award No. 382-B1-FT* (1988), 19 Iran-USCTR 273.

[82] *The Islamic Republic of Iran and the United States of America*, Interlocutory Award No. ITL 83-B1-FT (Counterclaim) (9 September 2004), 2004, WL 2210709 (Iran-USCTR), para. 111.

34. ICSID tribunals have frequently recognized subsequent agreements and subsequent practice as means of interpretation.[83] In some decisions, tribunals have even emphasized that subsequent practice is a particularly important means of interpretation for such provisions which the parties to the treaty intended to evolve in the light of subsequent treaty practice. In the case of *Mihaly International Corporation v. Democratic Socialist Republic of Sri Lanka*, for example, the Tribunal held:

> Neither party asserted that the ICSID Convention contains any precise a priori definition of "investment". Rather, the definition was left to be worked out in the subsequent practice of States, thereby preserving its integrity and flexibility and allowing for future progressive development of international law on the topic of investment.[84]

35. NAFTA panels have on several occasions recognized subsequent agreements and subsequent practice as means of interpretation.[85] While NAFTA Panels do not seem to have discussed subsequent practice very often,[86] they have intensely argued about the legal effects of a document held to be a subsequent agreement.[87]

(c) Human rights courts and the Human Rights Committee

36. Human rights courts and treaty bodies have followed a somewhat different approach with regard to subsequent agreements and subsequent practice than adjudicative bodies under international economic treaty regimes. Thus, human rights courts and treaty bodies do not seem to have considered subsequent agreements by the parties in their interpretation of substantive human rights provisions. The situation is different, however, for subsequent practice by the parties.

37. The European Court of Human Rights has from time to time invoked article 31 (3) (b) of the Vienna Convention, mostly in cases which concerned the relationship of the Court with the member States, and in cases which raised

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[83] See *Enron Corporation and Ponderosa Assets, LP v. Argentine Republic* (United States/Argentina BIT) (Annulment Proceeding, Decision on the Argentine Republic's Request for a Continued Stay of Enforcement of the Award) ICSID Case No. ARB/01/3 (7 October 2008), para. 70 (http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC830_En&caseId=C3, accessed 24 January 2013); *Siemens AG v. Argentine Republic* (Germany/Argentina BIT) (Decision on Jurisdiction), ICSID Case No. ARB/02/8 (3 August 2004), para. 105 (http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC508_En&caseId=C7, accessed 24 January 2013); *National Grid PLC v. the Argentine Republic* (UK/Argentina BIT) (Decision on Jurisdiction) UNCITRAL (20 June 2006), paras. 84 and 85 (http://ita.law.uvic.ca/documents/NationalGrid-Jurisdiction-En.pdf, accessed 24 January 2013).

[84] *Mihaly International Corporation v. Democratic Socialist Republic of Sri Lanka* (United States/Sri Lanka BIT) (Award and Concurring Opinion), ICSID Case No. ARB/00/2 (15 March 2002) [2004], 6 ICSID Rep. 310, para. 33; similarly *Autopista Concesionada de Venezuela, CA v. Bolivarian Republic of Venezuela* (Decision on Jurisdiction), ICSID Case No. ARB/00/5 (27 September 2001) [2004], 6 ICSID Rep. 419, para. 97.

[85] *CCFT v. United States* (see footnote 38), paras. 181-183.

[86] *In the Matter of Cross-Border Trucking Services* (Final Report of the Panel), Arbitral Panel Established Pursuant to article 2008, Secretariat File No. USA-MEX-98-2008-01 (6 February 2001), paras. 220, 221 and 235 (http://registry.nafta-sec-alena.org/cmdocuments/8f70c18a-7f02-4126-96f6-182a11c90517.pdf, accessed 16 January 2013); *Agricultural Tariffs (United States v. Canada)* (see footnote 38), paras. 119, 141 and 142.

[87] See below at sect. V.1. (e), paras. 88-90.

questions of general international law.[88] More often, however, the Court has referred to the legislative practice of member States without explicitly mentioning article 31 (3) (b) of the Vienna Convention.[89] In such cases the Court has confirmed that uniform, or largely uniform national legislation, and even domestic administrative practice, can in principle constitute relevant subsequent practice[90] and may have effects which can go even beyond that of being merely a means of interpretation according to article 31 (3) (b) of the Vienna Convention.[91] Thus, judgments in which the Court has relied on subsequent State practice without explicitly quoting article 31 (3) (b) are more characteristic than those in which it has. Since *Tyrer v. the United Kingdom* the Court has typically relied on subsequent State (and other) practice as orientation for its "dynamic" or "evolutive" interpretation. The Court determines the character and the extent of its evolutive interpretation by looking at the more or less specific "present-day conditions" and "developments in international law" which the Court recognizes on the basis of:

> a set of rules and principles that are accepted by the vast majority of States, the common international or domestic law standards of European States [which] reflect a reality that the Court cannot disregard when it is called upon to clarify the scope of a Convention provision that more conventional means of interpretation have not enabled it to establish with a sufficient degree of certainty.[92]

38. Indeed, whenever the Court has recognized that it is engaging in "evolutive interpretation", it has typically referred to State, social or international legal practice as orientation.[93]

39. It appears that the Inter-American Court of Human Rights, in contrast to the European Court of Human Rights, has so far not referred to article 31 (3) (a) or (b) of the Vienna Convention, and the number of decisions in which the Court has referred to subsequent practice is rather limited.[94] However, despite its rare

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[88] *Cruz Varas* (see footnote 42), para. 100; *Loizidou* (see footnote 42), para. 73; *Bankovic* (see footnote 42), para. 56.

[89] See, for example *Lautsi and Others v. Italy* [GC], Application No. 30814/06 (European Court of Human Rights, 18 March 2011), para. 61, and *Herrmann v. Germany* [GC], Application No. 9300/07 (European Court of Human Rights, 26 June 2012), para. 78.

[90] See, for example, *Mamatkulov and Askarov v. Turkey* (see footnote 42), paras. 111 and 123; *Johnston and others v. Ireland* (see footnote 42), para. 51; *Al-Saadoon and Mufdhi* (see footnote 42), para. 126; *Rantsev v. Cyprus and Russia* (see footnote 42), paras. 273 and 274; *Demir and Baykara* (see footnote 42), para. 65.

[91] *Soering* (see footnote 43), para. 103; *Al-Saadoon and Mufdhi* (see footnote 42), para. 119, quoting *Öcalan* (see footnote 46), para. 163.

[92] *Demir and Baykara* (see footnote 42), para. 76.

[93] See, for example, *Öcalan* (see footnote 46), para. 163; *VO v. France* [GC] ECHR 2004-VIII; *Johnston* (see footnote 42), para. 53; *Bayatyan v. Armenia* Application No. 23459/03 (European Court of Human Rights, 27 October 2009), para. 63, selected for publication in *Reports of Judgments and Decisions*; *Soering* (see footnote 43), para. 103; *Öcalan* (see footnote 46), para. 191; *Al-Saadoon and Mufdhi* (see footnote 42), para. 119.

[94] *Gelman v. Uruguay* (Merits and Reparations, Judgment), Inter-American Court of Human Rights, Series C, No. 221 (27 February 2011), paras. 215-224, and the Concurring Opinion of Judge Vio Grossi in *Lopéz Mendoza v. Venezuela* (Merits, Reparations and Costs, Judgment), Inter-American Court of Human Rights, Series C, No. 233 (1 September 2011), para. 3; see also *Hilaire, Constantine and Benjamin and others v. Trinidad and Tobago* (Merits, Reparations and Costs, Judgment), Inter-American Court of Human Rights, Series C, No. 94 (21 June 2002), para. 12; see also *"White Van" (Paniagua-Morales and others v. Guatemala)* (see footnote 48).

mentioning of subsequent practice *stricto sensu*, the Inter-American Court makes abundant references to international developments in a broader sense, which are located somewhere between subsequent practice, in the sense of article 31 (3) (b), and other "relevant rules" related to article 31 (3) (c) of the Vienna Convention.[95] The Human Rights Committee, on its part, has occasionally considered subsequent State practice more closely.[96] The reason why the Inter-American Court of Human Rights and the Human Rights Committee refer less to subsequent practice than the European Court of Human Rights may, inter alia, have to do with a lack of resources to reliably verify a sufficiently representative part of the relevant practice.

(d) Other international adjudicative bodies

40. The International Tribunal for the Law of the Sea has, on some occasions, considered the subsequent practice of the parties as means of interpretation.[97] The International Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda have recognized that the interpretation of substantive international criminal law, including treaties, must take into account the subsequent interpretative practice of national courts.[98] Both Tribunals have not limited themselves to considering the subsequent jurisprudence of domestic courts, but they also refer to subsequent executive or military State practice.[99] The International Tribunal for the Former Yugoslavia has even taken more general forms of State practice into account, including trends in the legislation of member States which, in turn, can give rise to a changed interpretation of the scope of crimes or their elements. In *Furundžija*, for example, the Chamber of the International Tribunal for the Former Yugoslavia, in search of a definition for the crime of rape as prohibited by article 27 of the Fourth Geneva Convention, article 76 (1) of the first additional Protocol, and article 4 (2) (e) of the second additional Protocol,[100] examined the principles of criminal law common to the major legal systems of the world and held

> ... that a trend can be discerned in the national legislation of a number of States of broadening the definition of rape so that it now embraces acts that were previously classified as comparatively less serious offences, that is sexual or indecent assault. This trend shows that at the national level States tend to take a stricter attitude towards serious forms of sexual assault: the

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[95] See, for example, *Velásquez-Rodriguez v. Honduras* (Merits, Judgment), Inter-American Court of Human Rights, Series C, No. 4 (29 July 1988), para. 151; *The Right to Information on Consular Assistance. In the Framework of the Guarantees of the due Process of Law* (Advisory Opinion), Inter-American Court of Human Rights, Series A, No. 16 (1 October 1999), paras. 130-133 and 137.

[96] *Kindler v. Canada* (30 July 1993), Communication No. 470/1991, para. 14.2; *Judge v. Canada* (5 August 2002), Communication No. 829/1998, para. 10.3; *Barrett and Sutcliffe v. Jamaica* (30 March 1992), Communication No. 270/1980, para. 8.4; *Simms v. Jamaica* (3 April 1995), Communication No. 541/1993, para. 6.5.

[97] *The M/V "SAIGA" (No. 2) Case (Saint Vincent and the Grenadines v. Guinea)* (Judgment of 1 July 1999) ITLOS Case No. 2, paras. 155 and 156; see also *The M/V "SAIGA" (No. 1) Case (Saint Vincent and the Grenadines v. Guinea)* (Prompt Release) (Judgment of 4 December 1997), ITLOS Case No. 1, para. 57.

[98] *Kupreškić and others* (Judgment), ICTY-95-16 (14 January 2000), para. 541; see also, *Akayesu* (Judgment), ICTR-96-4-T, T Ch I (2 September 1998), paras. 503 and 542ff.

[99] *Tadić* (Judgment), ICTY-94-1 (15 July 1999), para. 94; *Jelisić* (see footnote 65), para. 61 (footnotes omitted).

[100] *Furundžija* (Judgment), ICTY-95-17/1 (10 December 1998), paras. 165 ff.

> stigma of rape now attaches to a growing category of sexual offences, provided of course they meet certain requirements, chiefly that of forced physical penetration.[101]

41. The European Court of Justice, in contrast to other international adjudicatory bodies, has refrained from taking subsequent practice of the member States into account when interpreting the founding treaties of the Union (primary Union law). This is in keeping with its general approach to treat the founding treaties as constituting an "autonomous legal order" and thus not to refer to and apply the Vienna Convention when interpreting those treaties.[102] However, the Court does take subsequent practice into account when it interprets agreements which the Union has concluded with third States, and it has recognized the relevance of "settled practice of the parties to the Agreement" for the purpose of their interpretation.[103]

2. Subsequent agreements and subsequent practice among the different means of interpretation

42. The recognition of subsequent agreements and subsequent practice as means of interpretation by international adjudicatory bodies has led to their application in a wide variety of situations. For the present purpose it is sufficient to point to a few cases in the jurisprudence of ICJ which exemplify the role which subsequent agreements and subsequent practice can play in relation to other means of interpretation. The most important of such other means of interpretation are the "ordinary meaning" of the terms of a treaty, their "context", and the "object and purpose" of the treaty (article 31 (1) of the Vienna Convention (a) to (c)).

(a) Ordinary meaning

43. As far as the "ordinary meaning" of treaty terms is concerned, the Court has, for example,[104] determined in the *Nuclear Weapons Advisory Opinion* that "poison or poisonous weapons":

> have been understood, in the practice of States, in their ordinary sense as covering weapons whose prime, or even exclusive, effect is to poison or asphyxiate. This practice is clear, and the parties to those instruments have not treated them as referring to nuclear weapons.[105]

44. In the Case of *United States Nationals in Morocco*, ICJ stated that:

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[101] Ibid., para. 179; similarly *Musema* (Judgment), ICTR-96-13-A, Trial Chamber I (27 January 2000), paras. 220 ff, in particular para. 228.

[102] See paras. 26 and 27 above.

[103] See Case C-52/77, *Leonce Cayrol v. Giovanni Rivoira & Figli* [1977] ECR 2261, para. 18; at 2277; see also Case C-432/92, *The Queen v. Minister of Agriculture, Fisheries and Food, ex parte S P Anastasiou (Pissouri) Ltd. and others* [1994] ECR I-3087, paras. 43 and 50.

[104] See also *Case concerning the Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria)* (Preliminary Objections) [1998], *I.C.J. Reports 1998*, p. 306, para. 67; *Case concerning Oil Platforms (Islamic Republic of Iran v. United States of America)* (Preliminary Objection) [1996], *I.C.J. Reports 1996*, p. 815, para. 30; *Competence of the General Assembly for the Admission of a State to the United Nations* (Advisory Opinion) [1950], *I.C.J. Reports 1950*, p. 9.

[105] *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion) [1996], *I.C.J. Reports 1996*, p. 248, para. 55.

> [t]he general impression created by an examination of the relevant materials is that those responsible for the administration of the customs (...) have made use of all the various elements of valuation available to them, though perhaps not always in a consistent manner. In these circumstances, the Court is of the opinion that Article 95 lays down no strict rule on the point in dispute.[106]

45. And in the *Mazilu Case* ICJ held that:

> [i]n practice, according to the information supplied by the Secretary-General, the United Nations has had occasion to entrust missions — increasingly varied in nature — to persons not having the status of United Nations officials. (...) In all these cases, the practice of the United Nations shows that the persons so appointed, and in particular the members of such committees and commissions, have been regarded as experts on mission within the meaning of Section 22.[107]

46. In most cases ICJ considered the determination of the "ordinary meaning" of a treaty term, as it was specified by the subsequent practice of the parties, to be determinative, regardless of whether this practice suggested a broader or a more restrictive interpretation of the "ordinary meaning".[108] One well-known example is the interpretation by ICJ in the *Certain Expenses Opinion* of the terms "expenses" (broad interpretation) and "action" (restrictive interpretation) in the light of the subsequent practice of the Organization.[109]

47. Subsequent practice of the parties thus often exerts a pull towards a narrowing of different possible textual meanings. It is also possible, however, that subsequent practice indicates openness for different shades of meaning or suggests a broad interpretation of the terms of a treaty.[110]

(b) Context

48. The interpretation of a treaty is not confined to the interpretation of the text of its specific terms but also encompasses the "terms of the treaty in their context" (article 31 (1) of the Vienna Convention) as a whole. Subsequent agreements and subsequent practice may also influence the interpretation of a particular rule when the practice relates to the treaty as a whole or to other relevant treaty rules.[111] Accordingly, ICJ held in the *IMCO* case:

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[106] *Case concerning Rights of Nationals of the United States of America in Morocco (France v. United States of America)* [1952], *I.C.J. Reports 1952*, p. 211.

[107] *Applicability of Article VI, Section 22, of the Convention on the Privileges and Immunities of the United Nations* (Advisory Opinion) [1989], *I.C.J. Reports 1989*, p. 194, para. 48.

[108] See, for an exception, *Land, Island and Maritime Frontier Dispute (El Salvador v. Honduras: Nicaragua intervening)* [1992], *I.C.J. Reports 1992*, p. 586, para. 380.

[109] *Certain Expenses of the United Nations* (Advisory Opinion) [1962], *I.C.J. Reports 1962*, pp. 158ff ("expenses") and pp. 164ff ("action").

[110] The European Court of Human Rights, in particular, accepts that diverse or non-uniform practice may indicate that the contracting parties enjoy a wide margin of appreciation in complying with their obligations under the European Convention on Human Rights; see e.g., *Lautsi and Others v. Italy* [GC], Application No. 30814/06 (European Court of Human Rights, 18 March 2011), para. 61, and *Van der Heijden v. the Netherlands* [GC], Application No. 42857/05 (European Court of Human Rights, 3 April 2012), paras. 31 and 61.

[111] See, for example, *Case concerning Border and Transborder Armed Actions (Nicaragua v. Honduras)* (Jurisdiction and Admissibility) [1988], *I.C.J. Reports 1988*, p. 87, para. 40.

> This reliance upon registered tonnage in giving effect to different provisions of the Convention (...), persuade the Court to view that it is unlikely that when the latter article [Article 28 (a)] was drafted and incorporated into the Convention it was contemplated that any criterion other than registered tonnage should determine which were the largest shipping owning nations.[112]

49. While subsequent agreements and subsequent practice are mostly used to elucidate ambiguous or general terms,[113] it would go too far to assume that the meaning of apparently clear terms is largely immune from being called into question by subsequent agreements or subsequent practice of the parties.[114] The ICJ has indeed, on occasion, found subsequent practice to render an apparently clear treaty provision more open-ended. One example is the *Wall Advisory Opinion* in which ICJ has held:

> that the accepted practice of the General Assembly, as it has evolved, is consistent with Article 12, paragraph 1, of the Charter.[115]

50. Article 12 of the Charter of the United Nations is a provision whose text does not clearly reflect what the subsequent practice of the General Assembly was suggesting.

(c) Object and purpose

51. Article 31 (1) of the Vienna Convention provides that a treaty shall also be interpreted "in the light of its object and purpose". Subsequent agreements and subsequent practice, on the one hand, and the object and purpose of a treaty, on the other, can be closely interrelated. Thus, subsequent conduct of the parties is sometimes used for specifying the object and purpose of the treaty in the first place.[116] In *Denmark v. Norway*, for example, ICJ clarified the object and purpose of a bilateral agreement on the delimitation of the continental shelf by referring to

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[112] *Constitution of the Maritime Safety Committee of the Inter-Governmental Maritime Consultative Organization* (Advisory Opinion) [1960], *I.C.J. Reports 1960*, p. 169 and 167ff; in the same sense: *Proceedings pursuant to the OSPAR Convention (Ireland — United Kingdom)* (2003), *Reports of International Arbitral Awards*, vol. XXIII (Part II), p. 91, para. 141.

[113] *Case Concerning the Arbitral Award made by the King of Spain on 23 December 1906 (Honduras v. Nicaragua)* [1960], *I.C.J. Reports 1960*, pp. 208ff; *Case Concerning the Dispute Regarding Navigational and Related Rights (Costa Rica v. Nicaragua)* (see footnote 19), Declaration of Judge ad hoc Guillaume, p. 290.

[114] *Certain Expenses of the United Nations* (Advisory Opinion) (Dissenting Opinion of Judge Spender) [1962], *I.C.J. Reports 1962*, p. 189.

[115] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion) [2004], *I.C.J. Reports 2004*, p. 150, para. 28.

[116] *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council resolution 276 (1970)* (Advisory Opinion) [1971], *I.C.J. Reports 1971*, p. 179; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion) [2004], *I.C.J. Reports 2004*, p. 179, para. 109; *Case concerning Oil Platforms (Islamic Republic of Iran v. United States of America)* (Preliminary Objection) [1996], *I.C.J. Reports 1996*, p. 815, para. 30; Rosalyn Higgins, "Some Observations on the Inter-Temporal Rule in International Law" in Jerzy Makarczyk (ed.), *Theory of International Law at the Threshold of the 21st Century* (Kluwer Law International, 1996), p. 180; Giovanni Distefano, "La pratique subséquente des Etats Parties à un traité" (1994), *Annuaire français de droit international*, vol. 40, pp. 52-54.

subsequent practice as well as to the implementation by the parties.[117] In *Cameroon v. Nigeria* ICJ held:

> From the treaty texts and the practice analysed at paragraphs 64 and 65 above, it emerges that the Lake Chad Basin Commission is an international organization exercising its powers within a specific geographical area; that it does not, however, have as its purpose the settlement at a regional level of matters relating to the maintenance of international peace and security and thus does not fall under Chapter VIII of the Charter.[118]

52. It has been suggested that the character of an instrument (for example multilateral/bilateral/unilateral; law-making/contractual) and the nature of the subject matter (for example technical/value-oriented; economic/human rights) as elements of the object and purpose of a treaty would contribute to determining how much room is available for subsequent agreements and subsequent practice as a means of interpretation.[119] Such assumptions cannot, however, be clearly confirmed by the jurisprudence of ICJ. Subsequent agreements and subsequent practice have been used as an important means of interpretation of the Charter of the United Nations,[120] as well as for bilateral boundary treaties[121] and for unilateral submissions to the jurisdiction of a court or tribunal.[122] And there seems to be no conspicuous difference with respect to the relative importance of subsequent agreements or subsequent practice between "law-making" and "contractual" treaties, if such a distinction can be drawn at all. The same is true for the difference between more technical and more value-oriented treaties or provisions.

53. This observation from the jurisprudence of ICJ cannot, however, be taken to apply generally. Adjudicative bodies under international economic, human rights and other treaties sometimes put more emphasis on the "object and purpose" of a treaty, or on the "ordinary meaning" of a term of a treaty, depending on the regime in question.[123] It would therefore be premature to conclude from the jurisprudence of ICJ that the character of the instrument and the nature of the subject matter, as elements of the object and purpose of a treaty, do not influence the relative importance of subsequent agreements or subsequent practice for the interpretation of a treaty. It is possible that the comparatively low number of cases and the lack of specialization of ICJ have so far prevented a more differentiated picture to emerge from its jurisprudence. It may, therefore, be appropriate to review this question more closely at a later stage of the work.

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[117] *Case concerning Maritime Delimitation in the Area between Greenland and Jan Mayen (Denmark v. Norway)* [1993], *I.C.J. Reports 1993*, p. 51, para. 27.

[118] See also *Case concerning the Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria)* (Preliminary Objections) [1998], *I.C.J. Reports 1998*, p. 306, para. 67.

[119] *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council resolution 276 (1970)* (Advisory Opinion) (Separate Opinion of Judge Dillard) [1971], *I.C.J. Reports 1971*, p. 154, footnote 1.

[120] See, for example, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion) [2004], *I.C.J. Reports 2004*, p. 149, para. 27.

[121] See, for example, *Case concerning Kasikili/Sedudu Island (Botswana v. Namibia)* [1999], *I.C.J. Reports 1999*, p. 1087, para. 63.

[122] See, for example, *Anglo-Iranian Oil Co. (United Kingdom v. Iran)* (Preliminary Objection) [1952], *I.C.J. Reports 1952*, p. 106.

[123] See paras. 11-27 above.

3. Contemporaneous and evolutive interpretation

54. The possible legal significance of subsequent agreements and subsequent practice as means of interpretation also depends on the so-called intertemporal law.[124] This concerns the question whether a treaty must be interpreted in the light of the circumstances at the time of its conclusion ("contemporaneous interpretation"), or rather in the light of the circumstances at the time of its application ("evolutive interpretation").[125] Originally, Max Huber's dictum in the *Island of Palmas* case according to which "a judicial fact must be appreciated in the light of the law contemporary with it"[126] had led many to generally favour "contemporaneous interpretation".[127]

(a) The Commission's previous work

55. The Commission has dealt with the question of intertemporal law primarily in its work on the law of treaties and on the fragmentation of international law. During its work on the draft articles on the law of treaties, the Commission discussed the question of treaty interpretation "over time" in the context of what would later become article 31 (3) (c) of the Vienna Convention. At the time the Commission found that "to attempt to formulate a rule covering comprehensively the temporal element would present difficulties" and it, therefore, "concluded that it should omit the temporal element".[128]

56. The matter was addressed again within the Study Group on fragmentation.[129] The debates within that Study Group led to the conclusion that it is difficult to formulate and to agree on a general rule which would give preference either to a principle of contemporaneous interpretation or to one of evolutive interpretation. In his final report, the Chair of the Study Group, Martti Koskenniemi, therefore, concluded that it would be "best (...) to merely single out some considerations"[130] to be taken into account when interpreting a particular treaty:

> The starting-point must be (...) the fact that deciding this issue is a matter of interpreting the treaty itself. Does the language used give any indication? The starting-point of the argument might plausibly be the "principle of contemporaneity" — with regard to the normative environment as it existed at

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[124] Malgosia Fitzmaurice, "Dynamic (Evolutive) Interpretation of Treaties" (2008) *Hague Yearbook of International Law*, vol. 21, pp. 101ff; T.O. Elias, "The Doctrine of Intertemporal Law" (1980) *American Journal of International Law*, vol. 74, pp. 285ff; Don Greig, *Intertemporality and the Law of Treaties* (British Institute of International and Comparative Law, 2003); Markus Kotzur, "Intertemporal Law", *Max Planck Encyclopedia of Public International Law* (http://www.mpepil.com accessed 22 January 2013); Ulf Linderfalk, "Doing the Right Thing for the Right Reason: Why Dynamic or Static Approaches Should be Taken in the Interpretation of Treaties" (2008), *International Community Law Review*, vol. 10, No. 2, pp. 109ff; Alfred Verdross and Bruno Simma, *Universelles Völkerrecht* (3rd edition, Duncker & Humblot, 1984), pp. 496ff, paras. 782ff.

[125] M. Fitzmaurice, "Dynamic (Evolutive) Interpretation of Treaties" (see footnote 124), p. 101.

[126] *Island of Palmas* case *(Netherlands v. USA)* (1928), *Reports of International Arbitral Awards*, vol. II, p. 845.

[127] Higgins (see footnote 116), p. 174.

[128] *Yearbook of the International Law Commission* (1966), vol. II, p. 222, para. 16; Higgins (see footnote 116), p. 178.

[129] United Nations General Assembly, "Fragmentation of international law", Report of the ILC Study Group, finalized by Martti Koskenniemi (2006) (A/CN.4/L.682 and Corr.1, para. 475).

[130] Ibid., para. 478.

> the moment when the obligation entered into force for a relevant party. When might the treaty language itself, in its context, provide for the taking account of future developments? Examples of when this might be a reasonable assumption include at least:
>
> (a) Use of a term in the treaty which is "not static but evolutionary". (...)
>
> (b) The description of obligations in very general terms, thus operating a kind of *renvoi* to the State of the law at the time of its application. (...)

57. Thus, the previous work of the Commission leaves open the possibility that subsequent agreements and subsequent practice play a role in the determination of whether a more contemporaneous or a more evolutive interpretation is appropriate in a particular case.

(b) The relationship between evolutive interpretation and interpretation in the light of subsequent practice

58. The International Court has addressed the relationship between evolutive interpretation and subsequent practice of the parties in *Dispute regarding Navigational and Related Rights (Costa Rica v. Nicaragua)*.[131] This case concerned a treaty between Costa Rica and Nicaragua of 1858, which grants Costa Rica freedom of navigation on the San Juan River for "objetos de comercio" ("for the purposes of commerce"). Nicaragua asserted that, at the time when the treaty was concluded and for a long time thereafter, the term "comercio" was understood by the States parties to be limited to goods and did not cover services, and in particular not the transport of persons for the purpose of tourism. The Court, however, did not consider this argument to be conclusive:

> On the one hand, the subsequent practice of the parties, within the meaning of article 31 (3) (b) of the Vienna Convention, can result in a departure from the original intent on the basis of a tacit agreement between the parties. On the other hand, there are situations in which the parties' intent upon conclusion of the treaty was (...) to give the terms used (...) a meaning or content capable of evolving, not one fixed once and for all, so as to make allowance for, among other things, developments in international law.[132]

59. The Court then held that the term "comercio" was a "generic term" of which "the parties necessarily" had "been aware that the meaning (...) was likely to evolve over time" and that "the treaty has been entered into for a very long period", and concluded that "the parties must be presumed (...) to have intended" this term to "have an evolving meaning".[133] And since the term "commerce" would today generally be understood to cover both goods and services, the Court concluded that Costa Rica had the right, under the treaty, to transport not only goods but also persons on the San Juan River.[134] Judge Skotnikov, while considering that an evolutive treaty interpretation was not appropriate, arrived at the same result by accepting that a subsequent practice of Costa Rican-operated tourism on the San Juan River "for at least a decade" against which Nicaragua "never protested" but

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[131] *Dispute regarding Navigational and Related Rights (Costa Rica v. Nicaragua)* (see footnote 19), p. 213.

[132] Ibid., para. 64.

[133] Ibid., paras. 66-68.

[134] Ibid., para. 71.

rather "engaged in consistent practice of allowing tourist navigation" had led to a different understanding of the treaty, which would result in such services being included in the term "objetos de comercio".[135] Judge ad hoc Guillaume, also found "that the practice accords with this, as shown by the Memorandum of Understanding of 5 June 1994 between the two States' Ministers of Tourism and by the growth of tourist cruise traffic on the San Juan in recent years".[136]

60. The *Costa Rica v. Nicaragua* judgment demonstrates that subsequent agreements and subsequent practice of the parties can have both a supportive and a restrictive effect on the possibility of an evolutive interpretation. The supportive effect consists in confirming that an evolved understanding of a treaty can be based on subsequent practice as an authentic means of interpretation. The restrictive effect of subsequent practice[137] emerges when it is contrasted with an evolutive interpretation which is based on other grounds, in particular on the object and purpose of the treaty. Thus, the judges who emphasized the need for stability of treaty relations (Skotnikov, Guillaume) favoured the recognition of informally developed interpretation by way of subsequent practice, whereas the Opinion of the Court adopts a more dynamic approach by engaging in a more abstract form of evolutive interpretation. In any case, all judges in *Costa Rica v. Nicaragua* supported the conclusion that an evolutive interpretation is possible if it is accompanied by a common subsequent practice of the parties.

61. The nuanced approach, which is reflected in the report of the ILC Study Group on fragmentation of international law and in the *Costa Rica v. Nicaragua* judgment, is well-grounded in the jurisprudence of ICJ. This does not, however, prevent the alternative between a more contemporaneous or a more evolutive interpretation from re-emerging in specific cases. Judge Guillaume, in particular, has suggested that two different strands of jurisprudence existed, one tending towards a more contemporaneous and the other towards a more evolutive interpretation.[138] It is noteworthy, however, that the cases which, according to him, favour a more contemporaneous approach mostly concern rather specific terms in boundary treaties ("watershed";[139] "main channel/Thalweg";[140] names of places;[141] "mouth" of a river[142]). In such cases it is plausible that changes in the meaning of a (general or specific) terminology normally do not affect the substance of the specific

[135] Ibid., Separate Opinion of Judge Skotnikov, p. 283 and p. 285, para. 9.

[136] Ibid., Declaration of Judge ad hoc Guillaume, p. 290 and pp. 298 and 299, para. 16.

[137] See, for example, Alan Boyle and Christine Chinkin, *The Making of International Law* (Oxford University Press, 2007), p. 246.

[138] *Dispute regarding Navigational and Related Rights (Costa Rica v. Nicaragua)* (footnote 19), Declaration of Judge ad hoc Guillaume, p. 290, pp. 294ff, paras. 9ff; see also *Report of the International Law Commission, Fifty-seventh Session* (A/60/10, paras. 467 and 479); *Report of the International Law Commission Study Group on fragmentation of international law, finalized by Martti Koskenniemi* (2006) (A/CN.4/L.682 and Corr.1, 1, para. 478); resolution of the Institut de droit international on "Le problème intertemporel en droit international public" (1975) *Annuaire de l'Institut de droit international*, 536.

[139] *Case concerning the Temple of Preah Vihear (Cambodia v. Thailand)* (Merits) [1962] *I.C.J. Reports 1962*, p. 14.

[140] *Case concerning Kasikili/Sedudu Island (Botswana v. Namibia)* [1999] *I.C.J. Reports 1999*, p. 1060f, para. 21.

[141] *Decision regarding delimitation of the border between Eritrea and Ethiopia (Eritrea v. Ethiopia)* (2002) *Reports of International Arbitral Awards*, vol. XXV, part III, p. 110, para. 3.5.

[142] *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea intervening)* [2002] *I.C.J. Reports 2002*, p. 339, para. 48.

arrangement, which is designed to be as stable and as divulged from contextual elements as possible. On the other hand, those cases which would support the legitimacy of an evolutive interpretation turn around terms whose meaning is inherently more context dependent. This is true, in particular, for the terms "the strenuous conditions of the modern world" or "the well-being and development of such peoples" in article 22 of the Covenant of the League of Nations, which ICJ, in its *Namibia Opinion*, has given a progressive interpretation by referring to the evolution of the right of peoples to self-determination after the Second World War.[143] Other recognized grounds for the possibility of an evolutive interpretation are the "generic" character of a particular term in a treaty[144] and the fact that the treaty is designed to be "of continuing duration".[145] There may even be more specific reasons which can justify an evolutive interpretation. In the *Iron Rhine* case, for example, the continued viability and effectiveness of the arrangement, as such, was an important reason for the Tribunal to accept that even rather technical rules may have to be given an evolutive interpretation.[146]

62. In any case, the decisions in which ICJ has undertaken an evolutive interpretation have not strayed far from the text and from the determinable intention of the parties to the treaty, as they had also been expressed in their subsequent agreements and subsequent practice.[147] Thus, evolutive interpretation does not seem to be a separate method of interpretation but rather the result of a proper application of the usual means of interpretation.[148] It is therefore appropriate that subsequent agreements and subsequent practice have played an important role in leading cases in which international courts and tribunals have recognized and practised evolutive interpretation. In the *Namibia* case, for example, the ICJ referred to the practice of United Nations organs and of States in order to specify the conclusions which it derived from the inherently evolutive nature of the right to self-determination. In the *Aegean Sea* case, the Court found it "significant" that what it had identified as the "ordinary, generic sense" of the term "territorial dispute" was confirmed by the administrative practice of the United Nations and by the behaviour of the party which invoked the restrictive interpretation in a different context.[149]

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[143] *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council resolution 276 (1970)* [1971], *I.C.J. Reports 1971*, p. 30, para. 51.

[144] *Aegean Sea Continental Shelf* case *(Greece v. Turkey)* [1978] *I.C.J. Reports 1978*, p. 32, para. 77.

[145] *Dispute regarding Navigational and Related Rights (Costa Rica v. Nicaragua)* (see footnote 19), p. 213, para. 66.

[146] *Arbitration regarding the Iron Rhine ("Ijzeren Rijn") Railway (Belgium v. the Netherlands)* Permanent Court of Arbitration (award of 24 May 2005), para. 80: "in the present case it is not a conceptual or generic term that is in issue, but rather new technical developments relating to the operation and capacity of the railway", see also *Aegean Sea Continental Shelf* case (Judgment) [1978] *I.C.J. Reports 1978*, p. 32, para. 77; see *Case concerning the delimitation of maritime boundary between Guinea-Bissau and Senegal (Guinea-Bissau v. Senegal)* (Award of 31 July 1989) *Reports of the International Arbitral Awards*, pp. 151-152, para. 85.

[147] See also *Case concerning the delimitation of maritime boundary between Guinea-Bissau and Senegal* (1989), *Reports of International Arbitral Awards*, vol. XX, part II, pp. 119ff and 151f, para. 85.

[148] *Dispute regarding Navigational and Related Rights (Costa Rica v. Nicaragua)* (see footnote 19) Declaration of Judge ad hoc Guillaume, p. 290 and p. 294, para. 9; Verdross and Simma, *Universelles Völkerrecht* (see footnote 124), p. 498.

[149] *Aegean Sea Continental Shelf case (Greece v. Turkey)* [1978], *I.C.J. Reports 1978*, p. 31, para. 74.

63. On balance, the jurisprudence of ICJ and arbitral tribunals does not seem to contradict the "general support among the leading writers today for evolutive interpretation of treaties", as the Tribunal in the *Iron Rhine* case has noted.[150] Other international adjudicatory bodies have displayed different degrees of openness towards evolutive interpretation. While the Appellate Body of WTO has only exceptionally recognized and performed an evolutive interpretation, an evolutive approach to interpretation has become a characteristic feature of the jurisprudence of the European Court of Human Rights (European Convention on Human Rights as a "living instrument").[151] Thus, even if it would be still appropriate to proceed from a presumption that a treaty should be given a contemporaneous interpretation, this is not a strong presumption and it stands in the face of an open list of exceptions.

4. Conclusion: draft conclusion 2

64. Taken together, the preceding considerations suggest the following draft conclusion 2:[152]

Draft conclusion 2
Subsequent agreements and subsequent practice as authentic means of interpretation

Subsequent agreements and subsequent practice between the parties to a treaty are authentic means of interpretation which shall be taken into account in the interpretation of treaties.

Subsequent agreements and subsequent practice by the parties may guide an evolutive interpretation of a treaty.

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[150] *Arbitration regarding the Iron Rhine ("Ijzeren Rijn") Railway (Belgium v. the Netherlands)* (see footnote 146), para. 81; see, for example, J.M. Sorel, "Article 31", in Olivier Corten and Pierre Klein (eds.), *Les Conventions de Vienne sur le Droit des Traités* (Bruylant, 2006), p. 1330, para. 55.

[151] WTO, United States: Shrimp (see footnote 30), para. 130; European Court of Human Rights, *Tyrer* (see footnote 46), para. 31; *Al-Saadoon and Mufdhi* (see footnote 42), para. 119 quoting *Öcalan* (see footnote 46), para. 163; *Selmouni* (see footnote 46), para. 101.

[152] See preliminary conclusions 4 and 7 of the Chair of the Study Group on Treaties over time (A/66/10, para. 344), in particular preliminary conclusions 4 and 7 (first and second sentences):

(4) Recognition in principle of subsequent agreements and subsequent practice as means of interpretation

All adjudicatory bodies reviewed recognize that subsequent agreements and subsequent practice in the sense of article 31 (3) (a) and (b) VCLT are a means of interpretation which they should take into account when they interpret and apply treaties.

(7) Evolutionary interpretation and subsequent practice

Evolutionary interpretation is a form of purpose-oriented interpretation. Evolutionary interpretation may be guided by subsequent practice in a narrow and in a broad sense.

V. Definition of subsequent agreement and subsequent practice as means of treaty interpretation

65. Article 31 (3) (a) of the Vienna Convention recognizes "any subsequent agreement" (1) and article 31 (3) (b) of the Vienna Convention admits "subsequent practice" (2) under certain conditions as means of treaty interpretation. Subsequent practice by one or more parties to a treaty may also be a means of interpretation under article 32 of the Vienna Convention even if not all conditions of article 31 (3) (b) are fulfilled. The concepts of "subsequent agreement" and "subsequent practice" thus need to be defined.

1. Subsequent agreement

66. The concept "subsequent agreement" raises questions as to: (a) its form and distinction from "subsequent practice (...) which establishes the agreement of the parties"; (b) its relational character; (c) the required number of parties; and (d) its subsequent character.

(a) Form of "any subsequent agreement" and distinction from "subsequent practice (...) which establishes the agreement of the parties"

67. Article 31 (3) (a) of the Vienna Convention uses the term "subsequent agreement" and not the term "subsequent treaty". This does not mean, however, that a "subsequent agreement" is necessarily less formal than a "treaty". Whereas a "treaty" within the meaning of the Vienna Convention must be in written form (article 2 (1) (a) of the Vienna Convention), general international law knows no such requirement.[153] The term "agreement" in the Vienna Convention[154] and in general international law equally does not imply any particular degree of formality. Article 39 of the Vienna Convention, which lays down the general rule according to which "[a] treaty may be amended by agreement between the parties", has been explained by the Commission to mean that "[a]n amending agreement may take whatever form the parties to the original treaty may choose".[155] The drafters of the

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[153] *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahrain)* (Jurisdiction and Admissibility) [1994] *I.C.J. Reports 1994*, p. 92, para. 120f; see Mark E. Villiger, *Commentary on the 1969 Vienna Convention on the Law of Treaties* (Martinus Nijhoff, 2008), p. 81; Philippe Gautier, "Article 2 (1969)", in Olivier Corten and Pierre Klein (eds.), *The Vienna Conventions on the Law of Treaties: A Commentary, vol. 1* (Oxford University Press, 2011), pp. 38f; Jan Klabbers, *The Concept of Treaty in International Law* (Kluwer Law International, 1996), pp. 49f; see also A. Aust, "The theory and practice of informal international instruments" (1986) *International and Comparative Law Quarterly*, vol. 35, Issue 4, pp. 787 and 794ff.

[154] See articles 2 (1) (a), 3, 24 (2), 39-41, 58, 60 of the Vienna Convention.

[155] *Yearbook of the International Law Commission* (1966), vol. II, p. 232; see also Mark E. Villiger, *Commentary on the 1969 Vienna Convention on the Law of Treaties* (see footnote 153) article 39, p. 513, para. 7; Philippe Sands, "Article 39 (1969)" in Corten and Klein (eds.), *The Vienna Convention on the Law of Treaties* (see footnote 153), pp. 971-972, paras. 31-34.

Vienna Convention have also not envisaged any particular formal requirements for agreements in the sense of article 31 (3) (a) and (b) of the Vienna Convention.[156]

68. While every treaty is an agreement, not every agreement is a treaty. It is precisely the purpose of a "subsequent agreement" within the meaning of article 31 (3) (a) of the Vienna Convention that it "shall" only "be taken into account" in the interpretation of a treaty, but not necessarily be binding.[157] The question of the delimitation of when a subsequent agreement between the parties is binding and under which circumstances it is merely a means of interpretation among several others will be addressed in a later report.

69. It is, however, necessary to distinguish a "subsequent agreement" in the sense of article 31 (3) (a) of the Vienna Convention from "any subsequent practice (...) which establishes the agreement of the parties regarding its interpretation" in the sense of article 31 (3) (b) of the Vienna Convention. Otherwise, all agreements which are established by subsequent practice would simultaneously also be "subsequent agreements regarding the interpretation of the treaty" in the sense of article 31 (3) (a) of the Convention.

70. It should be noted at the outset that by distinguishing between "any subsequent agreement" (article 31 (3) (a)) and "subsequent practice (...) which establishes the agreement of the parties" (article 31 (3) (b)), the Commission did not intend to denote a difference concerning their possible legal effect. The Commentary describes a "subsequent agreement" as representing "an authentic interpretation by the parties which must be read into the treaty for purposes of its interpretation",[158] and states that "subsequent practice" "similarly" "constitutes objective evidence of the understanding of the parties as to the meaning of the treaty".[159] This explanation suggests that the difference between the two concepts lies in the fact that a "subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions" *ipso facto* has the effect of constituting an authentic interpretation of the treaty, whereas a "subsequent practice" only has this effect if it "shows the common understanding of the parties as to the meaning of the terms".[160] This suggests that a "subsequent agreement between the parties" is

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[156] ILC draft article 27 (3) (b), which later became article 31 (3) (b) of the Vienna Convention, contained the word "understanding" which was changed to "agreement" by the Vienna Conference. This change was "merely a drafting matter", see *Summary Records of the Plenary Meetings and of the Meetings of the Committee of the Whole*, United Nations Conference on the Law of Treaties (First session, *Official Records*) (Vienna, 26 March-24 May 1968) (A/CONF.39/11, p. 169). Hazel Fox, "Articles 31 (3) (a) and (b) of the Vienna Convention", in Malgosia Fitzmaurice, Olufemi Elias and Panos Merkouris (eds.) *Treaty Interpretation and the Vienna Convention on the Law of Treaties: 30 Years on* (Martinus Nijhoff, 2010), p. 63; see also *Case Concerning Kasikili/Sedudu Island (Botswana v. Namibia)* [1999] *I.C.J. Reports 1999*, p. 1045, Dissenting Opinion of Judge Weeramantry, paras. 23f.

[157] But see Ronald Bettauer, Deputy Legal Adviser, United States Department of State, remarks at the meeting, held on 10 October 2006, of the Lawyers' Committee on Nuclear Policy, New York City Bar, on the topic "Is the United States in compliance with international law on nuclear weapons?", excerpts reprinted in Sally J. Cummins (ed.), *Digest of United States Practice in International Law 2006* (International Law Institute, 2007), pp. 1260 and 1261.

[158] *Yearbook of the International Law Commission* (1966), vol. II, p. 221, para. 14.

[159] Ibid., para. 15.

[160] *Yearbook of the International Law Commission* (1966), vol. II, p. 222, para. 15; Wolfram Karl, *Vertrag und spätere Praxis im Völkerrecht* (Springer, 1983), p. 294.

typically easier to prove than a "subsequent practice (...) which establishes the agreement of the parties".[161]

71. The jurisprudence of international courts and other adjudicative bodies shows a certain reluctance to clearly distinguish between subsequent agreements and subsequent practice. In *Libya v. Chad*, ICJ used the expression "subsequent attitudes" both to denote what it later described as "subsequent agreements" as well as subsequent unilateral "attitudes".[162] In the case of *Indonesia v. Malaysia*, ICJ left the question open whether the use of a particular map could constitute a subsequent agreement or subsequent practice.[163] In the *Gabčikovo-Nagymaros* case, the Court spoke of "subsequent positions" in order to establish that "the explicit terms of the treaty itself were, therefore, in practice acknowledged by the parties to be negotiable".[164] In the *CME* award, an UNCITRAL tribunal recalled the term "common position" between the State of the investor and the respondent State in order to confirm its interpretation of the investment treaty without identifying this as a case of article 31 (3) (a) or (b) of the Vienna Convention.[165] Similarly the Panels and the Appellate Body of WTO also do not always distinguish clearly between subsequent agreement and subsequent practice.[166]

72. The NAFTA Panel in *CCFT (v. United States)*[167] addressed the question of the distinction between a subsequent agreement in the sense of article 31 (3) (a) of the Vienna Convention and subsequent practice in the sense of article 31 (3) (b) of the Convention more explicitly. In this case, the United States asserted that a number of unilateral actions by each of the three parties to NAFTA would, taken together,

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[161] *Case concerning Kasikili/Sedudu Island (Botswana/Namibia)* [1999], *I.C.J. Reports 1999*, p. 1087, para. 63.

[162] *Case concerning the Territorial Dispute (Libyan Arab Jamahiriya/Chad)* [1994], *I.C.J. Reports 1994*, p. 34, paras. 66ff.

[163] *Case concerning Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia v. Malaysia)* [2002], *I.C.J. Reports 2002*, p. 656, para. 61.

[164] *Case concerning the Gabčikovo-Nagymaros Project (Hungary/Slovakia)* [1997], *I.C.J. Reports 1997*, p. 77, para. 138, see also *Case concerning Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahrain)* (Jurisdiction and Admissibility) [1995], *I.C.J. Reports 1995*, p. 122, para. 28 ("subsequent conduct").

[165] *CME Czech Republic B.V. (The Netherlands) v. the Czech Republic* (Final Award) UNCITRAL Arbitration (14 March 2003), para. 437 (http://italaw.com/documents/CME-2003-Final_001.pdf, accessed 6 March 2013).

[166] See "Scheduling guidelines" in *Mexico: Telecoms — Report of the Panel* (2 April 2004) (WT/DS204/R) and in *United States: Gambling: Report of the Appellate Body* (7 April 2005) (WT/DS285/AB/R); to qualify "1981 Understanding" see *United States: Tax Treatment for Foreign Sales Corporations, Report of the Panel, unopposed* (8 October 1999) (WT/DS108/R). See "SCM Code" in *Brazil: Measures affecting desiccated coconut, Report of the Panel, unopposed* (17 October 1996) (WT/DS22/R), and a "waiver" in *European Communities: Bananas III, second recourse to article 21.5, Appellate Body Report* (26 November 2008) (WT/DS27/AB/RW2/ECU and WT/DS27/AB/RW/USA).

[167] *CCFT (v. United States)* (see footnote 38); *Compañia de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic* (Decision on the challenge to the President of the Committee) ICSID Case No. ARB/97/3 (3 October 2001) [2004] ICSID Rep 330, para. 12; see Panos Merkouris and Malgosia Fitzmaurice, "Canons of Treaty Interpretation: Selected Case Studies From the World Trade Organization and the North American Free Trade Agreement", in Malgosia Fitzmaurice, Olufemi Elias and Panos Merkouris (eds.), *Treaty Interpretation and the Vienna Convention on the Law of Treaties: 30 Years on* (Martinus Nijhoff, 2010), pp. 217-233.

constitute a subsequent agreement [168] In a first step, the Panel did not find that the evidence was sufficient to establish a subsequent agreement:

> The Respondent maintains that there is such a "subsequent agreement", and points to its own statements on the issue, before this Tribunal and elsewhere; to Mexico's Article 1128 submission in this arbitration; and to Canada's statements on the issue, first in implementing the NAFTA, and, later, in its counter-memorial in the Myers case.
>
> All of this is certainly suggestive of something approaching an agreement, but, to the Tribunal, all of this does not rise to the level of a "subsequent agreement" by the NAFTA Parties. (...) The Tribunal concludes that there is no "subsequent agreement" on this issue within the meaning of Article 31 (3) (a) of the Vienna Convention.[169]

73. In a second step, however, the Panel concluded that the very same evidence constituted a relevant subsequent practice:

> The question remains: is there "subsequent practice" that establishes the agreement of the NAFTA Parties on this issue within the meaning of Article 31 (3) (b)? The Tribunal concludes that there is. Although there is, to the Tribunal, insufficient evidence on the record to demonstrate a "subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions," the available evidence cited by the Respondent demonstrates to us that there is nevertheless a "subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its applications".[170]

74. This jurisprudence suggests that the distinction between a "subsequent agreement" and "subsequent practice (...) which establishes the agreement of the parties" in the sense of article 31 (3) of the Vienna Convention points to a different evidentiary standard for the determination of the "authentic" expression of the will of the parties. Subsequent agreements and subsequent practice are distinguished according to whether a common position can be identified *as such*, in a common expression, or whether it is necessary to indirectly identify an agreement through particular conduct or circumstances. In this sense, a "subsequent agreement" in the sense of article 31 (3) (a) of the Vienna Convention must be manifested as such, though not necessarily in written form,[171] whereas "subsequent practice" encompasses all (other) forms of relevant subsequent conduct by one or more parties to a treaty which contributes to the manifestation of an agreement of the parties regarding the interpretation of the treaty.

75. Thus, while "subsequent practice" can contribute to identifying an agreement between the parties, such practice is not the agreement itself. It is, however, not

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[168] *CCFT (v. United States)* (see footnote 38), paras. 174-177.

[169] Ibid., paras. 184-187.

[170] Ibid., paras. 188-189; in a similar sense: *Aguas del Tunari SA v. Republic of Bolivia* (Netherlands/Bolivia BIT) (Decision on Respondent's Objections to Jurisdiction) ICSID Case No. ARB/02/3 (21 October 2005) [2005] 20 *ICSID Review, Foreign Investment Law Journal* (2006), p. 450, para. 251; *Proceedings pursuant to the OSPAR Convention (Ireland — United Kingdom)* (2003) (see footnote 112), p. 110, para. 180.

[171] Sorel, "Article 31" (see footnote 150), p. 1320, para. 43; Richard Gardiner, *Treaty Interpretation* (Oxford University Press, 2008), p. 209.

excluded that "practice" and "agreement" coincide and cannot be distinguished by external evidence. This explains why the term subsequent practice is often used in the sense of a broader general category which encompasses both means of interpretation that are referred to in article 31 (3) (a) and (b) of the Vienna Convention.[172] Such a broad understanding of "subsequent practice", while perfectly possible in theory, would, however, level the distinction which is contained in the Vienna Convention and which serves the purpose of alerting States and other law appliers to different types of relevant subsequent interpretative conduct of the parties.

(b) Relational character

76. A "subsequent agreement" in the sense of article 31 (3) (a) of the Vienna Convention must be made "regarding the interpretation of the treaty or the application of its provisions", and thus be relational. By such an agreement the parties must purport, possibly among other aims, to clarify the meaning of a treaty or to indicate how the treaty is to be applied.[173]

77. A reference "regarding the (...) treaty" can often be identified by some indication of subordination of the "subsequent agreement" under the treaty to which it refers. Such reference may also be comprised in a later treaty which contains an agreement regarding the meaning of a previous treaty between the same parties. In the case of *Denmark v. Norway*, for example, ICJ considered whether a "subsequent treaty" between the parties "in the same field" could be used for the purpose of the interpretation of the previous treaty, but rejected this possibility because the later treaty did not in any way "refer" to the previous treaty.[174] In the case of *Costa Rica v. Nicaragua*, Judge Guillaume referred to the actual practice of tourism on the San Juan River in conformity with a memorandum of understanding between the two States.[175] The question is, however, whether this particular memorandum of understanding was meant by the parties to serve as an interpretation of the boundary treaty under examination. Thus, even an explicit agreement between the parties is not necessarily a "subsequent agreement" in the sense of article 31 (3) (a) of the Vienna Convention if it does not sufficiently relate to the treaty under review.

78. For the present definitional purpose it is not necessary to develop the relational character of a "subsequent agreement" more specifically. This will be done at a later stage of the work.

(c) Number of parties

79. A "subsequent agreement" in the sense of article 31 (3) (a) of the Vienna Convention is one between "the parties", that is, between all the parties to the treaty

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[172] *Case concerning Pulp Mills on the River Uruguay (Argentina v. Uruguay)* (Provisional Measures, Order of 13 July 2006) [2006], *I.C.J. Reports 2006*, p. 113, para. 53: in this case, even an explicit subsequent verbal agreement has been characterized by one of the parties as "subsequent practice".

[173] WTO, *United States: Tuna II (Mexico)* (see footnote 80), WT/DS381/AB/R, paras. 366-378, in particular para. 372; Ulf Linderfalk, *On the Interpretation of Treaties* (Springer, 2007), pp. 164f.

[174] *Case concerning Maritime Delimitation in the Area between Greenland and Jan Mayen (Denmark v. Norway)*[1993], *I.C.J. Reports 1993*, p. 51, para. 28.

[175] *Case Concerning the Dispute Regarding Navigational and Related Rights (Costa Rica v. Nicaragua)* (see footnote 19) Declaration of Judge ad hoc Guillaume, pp. 290, 298-299, para. 16.

(article 2 (1) (g) of the Vienna Convention). This does not necessarily mean, however, that the term "subsequent agreement", in itself and independently of article 31 (3) (a) of the Convention, is limited, for the purpose of the interpretation of treaties, to agreements between all the parties to a treaty. There are indeed also examples of agreements between a limited number of parties to a treaty regarding its interpretation.

80. Treaties with a broader membership are sometimes implemented by subsequent bilateral or regional agreements. Such agreements usually imply assertions concerning the permissible interpretation of the underlying treaty itself ("serial bilateralism").[176] The 1944 Chicago Convention on International Civil Aviation[177] is an example of such a form of subsequent implementation through bilateral agreements within a multilateral treaty framework. Between three and four thousand mostly bilateral air service agreements (ASA) or air transport agreements (ATA)[178] have been concluded since the entry into force of the Chicago Convention. This bilateral system has been described as a "complex web of interlocking ASA agreements",[179] which "evolved through subsequent State practice".[180] Such bilateral treaties are not, as such, subsequent agreements in the sense of article 31 (3) (a) of the Vienna Convention since they are only concluded between a limited number of the parties to the multilateral treaty. However, if taken together and sufficiently consistent and widespread, they may establish an agreement between all the parties regarding the meaning and scope of a respective multilateral treaty provision.

81. Should such agreements between a limited number of parties to a treaty regarding its interpretation be considered a "subsequent agreement" (in a broader sense) or should the use of the term "subsequent agreement" be limited to such agreements which are "between [all] the parties" of a treaty, as provided for in article 31 (3) (a) of the Vienna Convention? This is ultimately a question of terminological convenience since its response does not imply a conclusion regarding the value of a "subsequent agreement" between a limited number of States parties for the purpose of interpretation of the treaty. It is therefore theoretically possible to distinguish between a (subsequent) agreement between a limited number of parties regarding the interpretation of a treaty, on the one hand, and (subsequent) agreements regarding the interpretation of a treaty between all parties to the treaty. Such a distinction would not contradict article 31 (3) (a) since this provision only speaks of the latter without excluding that the former might be a supplementary means of interpretation under article 32 of the Vienna Convention or otherwise.

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[176] The expression is borrowed from Eyal Benvenisti and George W. Downs, "The Empire's New Clothes: Political Economy and the Fragmentation of International Law" (2007) *Stanford Law Review*, vol. 60, pp. 610-611.

[177] Convention on International Civil Aviation (Chicago Convention) (adopted on 7 December 1944, entered into force on 4 April 1947) United Nations, *Treaty Series*, vol. 15, No. 102, p. 295.

[178] See Harry A Bowen, "The Chicago International Civil Aviation Conference (1944-1945)" 13 *George Washington Law Review*, pp. 308 and 309ff.

[179] Department of Infrastructure and Transport, Australia, "The Bilateral System — how international air services work" (http://www.infrastructure.gov.au/aviation/international/bilateral_system.aspx, accessed 31 January 2013).

[180] Brian F. Havel, *Beyond Open Skies, A New Regime for International Aviation* (Kluwer Law International, 2009), p. 10.

82. Ultimately, however, it is more convenient for the purpose of the present project to limit the use of the term "subsequent agreement" to such agreements between all the parties to a treaty which are manifested in one individual agreement (or in one act with regard to which all parties agree in whatever form).[181] The example of bilateral air service agreements demonstrates that a group of different agreements between a limited number of parties of a multilateral treaty can just as well be conceived as a set of different factual elements — a "subsequent practice" — which together "establish the agreement of [all] the parties regarding" the interpretation of the treaty in the sense of article 31 (3) (b) of the Vienna Convention.

83. A group of different agreements between a limited number of parties is not one individual agreement, as the term "any subsequent agreement" in article 31 (3) (a) of the Vienna Convention suggests. The concept "subsequent agreement" should, for the sake of terminological clarity, be limited to individual agreements between all the parties, as indicated in article 31 (3) (a). Subsequent agreements (in a broader sense) between a limited number of parties may have interpretative value as a supplementary means of interpretation within the meaning of article 32 of the Vienna Convention, but in this case they are a form of "subsequent practice" (in a broader sense) which does not (yet) establish the agreement of all the parties (see below at sect. V.2 (a)).

(d) "Subsequent"

84. The Commission has explained that "subsequent agreements" in the sense of article 31 (3) (a) of the Vienna Convention are only those which are reached "after the conclusion of the treaty".[182] This point in time is not necessarily the moment in which the treaty has entered into force (article 24 of the Vienna Convention). Articles 18 and 25 of the Convention show that a treaty can already be regarded as being "concluded" for certain purposes before its actual entry into force. In such cases the relevant point in time is when the text of the treaty has been established as definite.[183]

85. This point in time is also appropriate for the determination of the moment from which an agreement can be regarded as "subsequent" in the sense of article 31 (3) (a) of the Vienna Convention. It would be difficult to identify a reason why an agreement by the parties which occurs between the moment when the text of a treaty has been established as definite and the entry into force of the treaty should not be as relevant for the purpose of interpretation as an agreement which occurs after the

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[181] See WTO, *United States: Tuna II (Mexico)* (see footnote 80) WT/DS381/AB/R, para. 371; Review Conference of the Rome Statute (Kampala, 31 May-11 June 2010), RC/Res. 6, annex III, adopted at the 13th plenary meeting, on 11 June 2011; and, generally, Stefan Barriga and Leena Groover, "A historic breakthrough on the crime of aggression" (2011) *American Journal of International Law*, vol. 105, No. 3, pp. 517 and 533. This aspect will be addressed in more detail in a later report.

[182] *Yearbook of the International Law Commission* (1966), vol. II, p. 221, para. 14.

[183] *Yearbook of the International Law Commission* (1951), vol. II, pp. 70ff; *Yearbook of the International Law Commission* (1956), vol. II, p. 112; Shabtai Rosenne, "Treaties, Conclusion and Entry into Force", in Rudolf Bernhardt (ed.), *Encyclopedia of Public International Law*, vol. 4 (North Holland Publishing, 2000), p. 933: "Strictly speaking it is the negotiation that is concluded through a treaty"; Villiger, *Commentary on the 1969 Vienna Convention on the Law of Treaties* (see footnote 153), p. 1295-1298, paras. 9-13.

entry into force. This is in line with the reservations regime under articles 19 to 23 of the Convention and with the rules on interpretative declarations which are *lex specialis*.[184]

86. The question from when on an agreement is "subsequent" must be distinguished from the question of the point in time after which the agreement is operative between the parties as a means of interpretation of the treaty. This depends on the moment when the States which have arrived at the agreement actually become a "party" to the treaty, that is, "a State which has consented to be bound by the treaty and for which the treaty is in force" (article 2 (g) of the Vienna Convention).

87. "Agreements" and "instruments"[185] which "are made in connection with the conclusion of the treaty" (article 31 (2) of the Vienna Convention) can be made either before or after the moment when the text of the treaty was established as definite.[186] If they are made after this moment such "agreements" and agreed "instruments" are special forms of "subsequent agreements".

(e) Interpretative agreements pursuant to a specific treaty provision

88. Certain treaty provisions, such as article IX.2 of the Agreement establishing WTO, provide that the parties may, under certain conditions, adopt more or less binding interpretations with respect to certain or all provisions of the treaty. The legal effects of decisions by the parties pursuant to such provisions are governed, in the first place, by the respective special treaty provisions. This does not exclude, however, that such decisions may, at the same time, constitute a "subsequent agreement" in the sense of article 31 (3) (a) of the Vienna Convention. This has been recognized, for example, by a Panel under NAFTA in the case of *Methanex v. the United States*. This case concerned a provision (article 1105 of NAFTA) with respect to which the parties to NAFTA had adopted an "interpretative note" ("Free Trade Commission Note") pursuant to article 1131 (2) of NAFTA, according to which "the (intergovernmental) Free Trade Commission may adopt an interpretation of a provision of NAFTA which shall be binding on a Tribunal established under Chapter 11":

> Leaving to one side the impact of Article 1131 (2) NAFTA, the FTC's interpretation must also be considered in the light of Article 31 (3) (a) of the Vienna Convention as it constitutes a subsequent agreement between the NAFTA Parties on the interpretation of Article 1105 NAFTA[187]

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[184] See A/66/10/Add.1.

[185] This may include unilateral declarations if the other party did not object, see German Federal Constitutional Court, *BVerfGE*, vol. 40, p. 176; see generally Gardiner (see footnote 171), pp. 215 and 216.

[186] Jennings and Watts, *Oppenheim's International Law* (see footnote 77), p. 1274, para. 632.

[187] *Methanex Corporation v. United States of America* (Final Award of the Tribunal on Jurisdiction and Merits) UNCITRAL Arbitration under NAFTA, Chapter Eleven (3 August 2005), Part II, chap. H, para. 23 (http://naftaclaims.com/Disputes/USA/Methanex/Methanex_Final_Award.pdf, accessed 28 January 2013).

89. Although the Federal Trade Commission Note has received a mixed reaction from some Chapter Eleven panels,[188] panels have generally not disputed that a decision pursuant to article 1131 (2) of NAFTA can, in principle, simultaneously be a subsequent agreement within the meaning of article 31 (3) (a) of the Vienna Convention. In a similar vein, the WTO Appellate Body has held in *EC — Banana III*:

> We consider that a multilateral interpretation pursuant to Article IX:2 of the WTO Agreement can be likened to a subsequent agreement regarding the interpretation of the treaty or the application of its provisions pursuant to Article 31 (3) (a) of the Vienna Convention, as far as the interpretation of the WTO agreements is concerned. (...)
>
> We further observe that, in its commentary on the Draft Articles on the Law of Treaties, the International Law Commission (the "ILC") describes a subsequent agreement within the meaning of Article 31 (3) (a) of the Vienna Convention "as a further *authentic element of interpretation* to be taken into account together with the context". In our view, by referring to "authentic interpretation", the ILC reads Article 31 (3) (a) as referring to agreements bearing specifically upon the interpretation of a treaty. In the WTO context, multilateral interpretations adopted pursuant to Article IX:2 of the WTO Agreement are most akin to subsequent agreements within the meaning of Article 31 (3) (a) of the Vienna Convention, ...[189]

90. This does not mean, however, that any decision or agreement of the parties pursuant to a specific treaty provision with implications for interpretation is necessarily also a subsequent agreement in the sense of article 31 (3) (a) of the Vienna Convention. For the present definitional purpose, however, it is sufficient to note that a subsequent agreement within the meaning of article 31 (3) (a) must not necessarily be self-standing, but may also be provided for in the treaty itself.

2. Subsequent practice

91. Like "subsequent agreement", the concept of "subsequent practice" raises a number of definitional questions. The most important is: (a) whether the term should be understood narrowly or broadly; (b) the "relational" character of subsequent practice; (c) the meaning of "subsequent"; and (d) who are the relevant actors.

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[188] *Pope & Talbot Inc. (Claimant) v. Government of Canada (Respondent)* (Award on the Merits of Phase 2), UNCITRAL Arbitration under NAFTA Chapter Eleven (10 April 2001), para. 46f (http://www.naftaclaims.com/Disputes/Canada/Pope/PopeFinalMeritsAward.pdf, accessed 28 January 2013); *ADF Group Inc. v. United States of America* (Award), ICSID Arbitration under NAFTA Chapter Eleven, ICSID Case No. ARB(AF)/00/1 (9 January 2003), para. 177 (http://www.state.gov/documents/organization/16586.pdf, accessed 28 January 2013); Charles Brower, "Why the FTC Notes of Interpretation Constitute a Partial Amendment of NAFTA Article 1105" (2006) *Virginia Journal of International Law* vol. 46, No. 2, pp. 349 and 350 with further citations; Anthea Roberts, "Power and Persuasion in Investment Treaty Interpretation" (2010), American Journal of International Law vol. 104, No. 2, pp. 179-225.

[189] *European Communities: Bananas III, Second Recourse to Article 21.5, Appellate Body Report* (26 November 2008) WT/DS27/AB/RW2/ECU and Corr.1 and WT/DS27/AB/RW/USA and Corr.1, paras. 383 and 390.

(a) Narrow or broad definition?

92. In *Japan: Alcoholic Beverages II*[190] the WTO Appellate Body has formulated a narrow definition of subsequent practice for the purpose of treaty interpretation:

> ... subsequent practice in interpreting a treaty has been recognized as a "concordant, common and consistent" sequence of acts or pronouncements which is sufficient to establish a discernable pattern implying the agreement of the parties regarding its interpretation.[191]

93. This definition is not limited to defining "subsequent practice" by parties in the application of the treaty *as such*,[192] but it adds other elements which are contained in article 31 (3) (b) of the Vienna Convention, in particular "the agreement of the parties regarding its interpretation". The definition suggests that only such "subsequent practice in the application of the treaty" "which establishes the agreement of the parties regarding its interpretation" can at all be relevant for the purpose of treaty interpretation, and not any other form of subsequent practice by one or more parties. This suggestion, however, is misleading. The jurisprudence of ICJ and other international courts and tribunals (i), and even the jurisprudence of the WTO itself (ii) demonstrate that subsequent practice which fulfils all the conditions of article 31 (3) (b) of the Vienna Convention is not the only form of subsequent practice by parties in the application of a treaty which is relevant for the purpose of treaty interpretation. This leads to the conclusion that "subsequent practice" in the application of a treaty by one or more parties as such should be distinguished from the question whether any such "subsequent practice" "establishes the agreement between the parties regarding its interpretation" (iii).

(i) Jurisprudence of the International Court of Justice and other international courts and tribunals

94. International courts and tribunals have distinguished between agreed "subsequent practice" in the sense of article 31 (3) (b) of the Vienna Convention, on the one hand, and subsequent practice in a broader sense by one or more parties to the treaty which may also be relevant for the purpose of interpretation.

95. In the *Case of Kasikili/Sedudu Island*, for example, ICJ held that a report by a technical expert which had been commissioned by one of the parties and which had "remained at all times an internal document",[193] while not representing "subsequent practice which establishes the agreement of the parties within the meaning of" article 31 (3) (b) of the Vienna Convention, could "nevertheless support the conclusions" which the Court had reached by other means of interpretation.[194] The same was true with respect to "factual findings that the parties concerned arrived at separately" and "which were expressed in concurrent terms in a joint report".[195] Of course, such unilateral or parallel subsequent interpretative practice does not carry

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[190] WTO, *Japan: Alcoholic Beverages II*, (see footnote 31) WT/DS8/AB/R, WT/DS10/AB/R and WT/DS11/AB/R, and *Report of the Panel* (11 July 1996) WT/DS8/R, WT/DS10/R and WT/DS11/R.

[191] WT/DS8/AB/R, WT/DS10/AB/R and WT/DS11/AB/R, sect. E.

[192] Emphasis added.

[193] *Case concerning Kasikili/Sedudu Island (Botswana v. Namibia)* [1999] *I.C.J. Reports 1999*, p. 1078, para. 55.

[194] Ibid., p. 1096, para. 80.

[195] Ibid., p. 1096, para. 80.

the same weight as subsequent practice which establishes the agreement of all the parties and thus cannot embody an "authentic" interpretation of a treaty by its parties.

96. ICSID Tribunals have also used subsequent State practice as means of interpretation in a broad sense.[196] For example, when addressing the question whether minority shareholders can acquire rights from investment protection treaties and have standing in ICSID procedures, the tribunal in *CMS Gas v. Argentina* held that:

> State practice further supports the meaning of this changing scenario. (...) Minority and non-controlling participations have thus been included in the protection granted or have been admitted to claim in their own right. Contemporary practice relating to lump-sum agreements (...) among other examples, evidence increasing flexibility in the handling of international claims.[197]

97. The European Court of Human Rights has in some cases referred to article 31 (3) (b) of the Vienna Convention without identifying an agreement between the parties in the respective subsequent practice. Thus, the Court asserted in *Loizidou v. Turkey*[198] that its interpretation was "confirmed by the subsequent practice of the Contracting parties",[199] that is, "the evidence of a practice denoting practically universal agreement amongst Contracting Parties that Articles 25 and 46 (...) of the Convention do not permit territorial or substantive restrictions".[200]

98. More often the European Court has relied on, not necessarily uniform, subsequent State practice by referring to national legislation, and even domestic administrative practice, as means of interpretation: Since *Tyrer v. the United Kingdom* the Court has typically given its "dynamic" or "evolutive" interpretations direction by describing and relying on subsequent State (and other) practice. Depending on the outcome of its analysis, consensus, no consensus, or a sufficiently qualified majority or tendency, the Court proceeds with a dynamic interpretation or not. In the case of *Demir and Baykara v. Turkey*,[201] for example, the Court held that "as to the practice of European States, it can be observed that, in the vast majority of them, the right for public servants to bargain collectively with the authorities has been recognized"[202] and that "the remaining exceptions can be justified only by particular circumstances".[203] In *Koch v. Germany*, on the other hand, the Court remarked that the contracting parties were "far from reaching a consensus" in

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[196] Fauchald (see footnote 35) p. 345.

[197] *CMS Gas Transmission Company v. Argentine Republic* (United States/Argentina BIT) (Decision of the Tribunal on Objections to Jurisdiction) ICSID Case No. ARB/01/8, (17 July 2003) [2003], 7 ICSID Report 492 (2003) para. 47 (footnote omitted).

[198] *Loizidou* (see footnote 42).

[199] Ibid., para. 79.

[200] Ibid., para. 80; it is noteworthy that the Court described "such a State practice" as being "uniform and consistent" despite the fact that it had recognized that two States possibly constituted exceptions (Cyprus and the United Kingdom; "whatever its meaning"), paras. 80-82.

[201] *Demir and Baykara* (see footnote 42).

[202] Ibid., para. 52.

[203] Ibid., para. 151; similarly *Jorgic v. Germany*, Application No. 74613/01 (ECtHR, 12 July 2007), para. 69, selected for publication in ECtHR, *Reports of Judgments and Decisions*; *Sigurdur A. Sigurjónsson v. Iceland* (1993), ECtHR, Series A, No. 264, para. 35; *A v. the United Kingdom* (ECHR 2002-X), paras. 80 and 83.

respect of allowing assistance to suicide and thus refused to limit their margin of appreciation by adopting an evolutive interpretation.[204] Finally, in *SH and Others v. Austria* the Court noted that an "emerging consensus" alone was not sufficient to restrict the member States' margin of appreciation for allowing or not allowing gamete donation for the purpose of in vitro fertilization.[205]

99. Even in those rare cases in which the Inter-American Court of Human Rights and the Human Rights Committee have taken subsequent practice of the parties into account,[206] they have not limited its use to cases in which the practice established the agreement of the parties. Thus, in the case of *Hilaire, Constantine and Benjamin and others v. Trinidad and Tobago*[207] the Inter-American Court held that the mandatory imposition of the death penalty for every form of conduct which resulted in the death of another person was incompatible with article 4 (2) of the American Convention on Human Rights (imposition of the death penalty only for the most serious crimes). In order to support this interpretation, the Court held that it was

> useful to consider some examples in this respect, taken from the legislation of those American countries that maintain the death penalty[208]

and observed that

> [i]n these countries the gradation according to gravity of each theory of deprivation of life is well recognized: from homicide to parricide. In all these countries, there exists a diversity of penalties corresponding to the diversity in gravity.[209]

100. Like the European Court of Human Rights, the Human Rights Committee is open to arguments based on subsequent practice when it comes to the justification of interference with the rights set forth in the Covenant.[210] Interpreting the rather general terms contained in article 19 (3) of the International Covenant on Civil and Political Rights (permissible restrictions of the freedom of expression), the Committee looked at relevant State practice. Based on the observation that:

> similar restrictions can be found in many jurisdictions,[211]

the Committee concluded that the aim pursued by the contested law did not, as such, fall outside the legitimate aims of article 19 (3) of the International Covenant on Civil and Political Rights.[212] The Committee, however, when it takes account of

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[204] *Koch v. Germany*, Application No. 497/09 (ECtHR, 19 July 2012), para. 70.

[205] *SH and Others v. Austria* [GC] Application No. 57813/00 (ECtHR, 3 November 2011), para. 96; see also *Stummer v. Austria* [GC] Application No. 37452/02 (ECtHR, 7 July 2011), paras. 105-109 and 129-132, where the Court also merely observed an "evolving trend" and, failing to identify a "European consensus", refused to proceed with a dynamic interpretation.

[206] See above at para. 39.

[207] *Hilaire, Constantine and Benjamin and others v. Trinidad and Tobago* (see footnote 94) (Concurrring separate opinion of Judge Sergio García Ramírez).

[208] Ibid., para. 12.

[209] Ibid.

[210] *Kim Jong-Cheol v. the Republic of Korea* (27 July 2005) (CCPR/C/84/D/968/2001) Communication No. 968/2001.

[211] Ibid., para. 8.3.

[212] Ibid.

subsequent practice typically does so by way of a summary assessment and does not give specific references.[213]

101. ITLOS has on some occasions referred to the subsequent practice of the parties without verifying whether such practice actually established an agreement between the parties regarding the interpretation of the treaty. In *the M/V "SAIGA" (No. 2)*,[214] for example, the Tribunal reviewed State practice with regard to the right of self-defence under Article 51 of the Charter of the United Nations. Relying on the "normal practice used to stop a ship", the Tribunal did not specify the respective State practice but rather assumed a certain general standard to exist.[215] In the *Southern Bluefin Tuna Cases* the Tribunal held that the practice by parties under the Convention for the Conservation of Southern Bluefin Tuna of 1993 was relevant to evaluate the extent to which States have complied with their obligations under the United Nations Convention on the Law of the Sea.[216] Thus, by taking into account the practice under another treaty with different parties the Tribunal has used the (subsequent) practice under a different treaty which does not encompass all parties to the Law of the Sea Convention.[217]

102. The *Jelisic* Judgment describes the overall methodological approach of the International Criminal Tribunals. Referring to the Genocide Convention and the practice performed under it,

> the Trial Chamber (...) interprets the Convention's terms in accordance with the general rules of interpretation of treaties set out in Articles 31 and 32 of the Vienna Convention on the Law of Treaties. (...) The Trial Chamber also took account of subsequent practice grounded upon the Convention. Special significance was attached to the Judgements rendered by the Tribunal for Rwanda. (...) The practice of States, notably through their national courts, and the work of international authorities in this field have also been taken into account.[218]

103. The International Tribunal for the Former Yugoslavia has taken even more general forms of State practice into account, including trends in the legislation of member States which in turn can give rise to a changed interpretation of the scope of crimes or their elements.[219]

(ii) Jurisprudence by WTO adjudicatory bodies

104. Even the WTO adjudicatory organs occasionally distinguish between "subsequent practice" that satisfies all the conditions of article 31 (3) (b) of the Vienna Convention and other forms of subsequent practice in the application of the

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[213] For a similar case see *Yoon and Choi v. The Republic of Korea* (see footnote 56) para. 8.4; in this case (see CCPR/C/88/D/1321-1322/2004, appendix), Committee Member Wedgwood criticized the approach of the Committee as displaying a selective perspective.

[214] *The M/V "SAIGA" (No. 2) Case (Judgment)* (see footnote 97), paras. 155 and 156.

[215] Ibid., para. 156; see also *The "Tomimaru" Case (Japan v. Russian Federation), Prompt Release* (Judgment of 6 August 2007), ITLOS Case No. 15, para. 72.

[216] *Southern Bluefin Tuna Cases (New Zealand v. Japan; Australia v. Japan)* (Provisional Measures, Order of 27 August 1999), ITLOS Case Nos. 3 and 4, para. 50.

[217] Ibid., para. 45.

[218] *Jelisic* (see footnote 65) para. 61 (footnotes omitted); similarly *Krstić* (see footnote 65) para. 541.

[219] *Furundzija* (see footnote 100) paras. 165ff and 179.

treaty, which they also recognize as being relevant for the purpose of treaty interpretation. In *US — Section 110(5) Copyright Act*[220] (not appealed), for example, the Panel had to determine whether a "minor exceptions doctrine" concerning royalty payments applied.[221] The Panel found evidence in support of the existence of such a doctrine in several Member States' national legislation and noted:

> ... we recall that Article 31 (3) of the Vienna Convention provides that together with the context (a) any subsequent agreement, (b) subsequent practice, or (c) any relevant rules of international law applicable between the parties, shall be taken into account for the purposes of interpretation. We note that the parties and third parties have brought to our attention several examples from various countries of limitations in national laws based on the minor exceptions doctrine. In our view, state practice as reflected in the national copyright laws of Berne Union members before and after 1948, 1967 and 1971, as well as of WTO Members before and after the date that the TRIPS Agreement became applicable to them, confirms our conclusion about the minor exceptions doctrine.[222]

And the Panel added the following cautionary footnote:

> By enunciating these examples of state practice we do not wish to express a view on whether these are sufficient to constitute "subsequent practice" within the meaning of Article 31 (3) (b) of the Vienna Convention.[223]

105. Another example of a use of subsequent practice in the broad sense is in the case of *EC — Computer Equipment* where the Appellate Body criticized the Panel for not having considered decisions by the Harmonized System Committee of the World Customs Organization (WCO) as a relevant subsequent practice:

> A proper interpretation also would have included an examination of the existence and relevance of subsequent practice. We note that the United States referred, before the Panel, to the decisions taken by the Harmonized System Committee of the WCO in April 1997 on the classification of certain LAN equipment as ADP machines. Singapore, a third party in the panel proceedings, also referred to these decisions. The European Communities observed that it had introduced reservations with regard to these decisions (...) However, we consider that in interpreting the tariff concessions in Schedule LXXX, decisions of the WCO may be relevant.[224]

106. Thus, on closer inspection, the jurisprudence of the WTO adjudicatory bodies distinguishes between a narrow definition which sets out the conditions under which "subsequent practice" is fully relevant in the sense of article 31 (3) (b) of the Vienna Convention and a broader concept of subsequent practice which does not presuppose an agreement between all the parties of the treaty.[225] Such subsequent

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[220] *United States: Section 110(5) Copyright Act*, Report of the Panel (15 June 2000), WT/DS160/R.

[221] See Trade-Related Aspects of Intellectual Property Rights (TRIPS), article 9.1.

[222] *United States: Section 110(5) Copyright Act — Panel* (see footnote 220), para. 6.55.

[223] Ibid., footnote 68.

[224] *European Communities: Computer Equipment* (see footnote 79) para. 90, see also Isabelle Van Damme, *Treaty Interpretation by the WTO Appellate Body* (Oxford University Press, 2009), p. 342.

[225] See also WTO, *US: COOL — Report of the Appellate Body* (29 June 2012), WT/DS384/AB/R and WT/DS386/AB/R, para. 452.

practice in a broader sense may then be relevant as a supplementary means of treaty interpretation within the meaning of article 32 of the Vienna Convention.

(iii) Conclusion

107. The jurisprudence of international courts and tribunals, including the Dispute Settlement Body of WTO, recognizes that not only "subsequent practice in the application of a treaty which establishes the agreement of the parties regarding its interpretation" may be relevant for the purpose of interpretation, but possibly also other subsequent practice which does not reflect an agreement on interpretation by all the parties. The concept of "subsequent practice" should therefore be defined broadly. A narrow definition such as the one by the WTO Appellate Body in the *Japan: Alcoholic Beverages II case*[226] may be helpful in identifying a fully agreed and authentic interpretation of a treaty in the sense of article 31 (3) (b) of the Vienna Convention. The taking into account of other treaty practice by States for the purpose of interpretation should not be excluded at the outset since it may in some situations serve as a supplementary means of interpretation in the sense of article 32 of the Vienna Convention. Such use of subsequent practice (in a broad sense) must, however, always remain within the limit of the rule that treaty interpretation is not self-judging and that "the view of one State does not make international law".[227] The distinction between agreed subsequent practice in the narrow sense of article 31 (3) (b) of the Vienna Convention and all other subsequent practice (in a broad sense) then serves to indicate a greater interpretative value which is to be attributed to the former.

108. The distinction between (agreed) subsequent practice in the narrow sense of article 31 (3) (b) of the Vienna Convention and subsequent practice in a broad sense of any particular instance of treaty interpretation or application by a party also helps to answer the question whether "subsequent practice" requires repeated action with some frequency[228] or whether a one-time application of the treaty may be enough.[229] Within the WTO framework, the Appellate Body has found:

> An isolated act is generally not sufficient to establish subsequent practice; it is a sequence of acts establishing the agreement of the parties that is relevant.[230]

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[226] See para. 92 above; the Appellate Body has taken the formula from a publication by Sir Ian Sinclair (*The Vienna Convention on the Law of Treaties* (2nd edition), Manchester University Press, 1984, p. 137), who drew on a similar formulation in French by Mustafa Kamil Yasseen, "L'interprétation des traités d'après la Convention de Vienne sur le droit des traités" (1976, vol. 3), *Recueil des Cours* vol. 151, pp. 48 and 49. Yasseen, a former member of ILC, had relied on elements from the work of the Commission, but this definition has never been adopted by ILC or ICJ.

[227] *Sempra Energy International v. Argentine Republic* (Award) ICSID Case No. ARB/02/16 (28 September 2007) para. 385 (https://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC694_En&caseId=C8, accessed 6 March 2013); *Enron Corporation and Ponderosa Assets, L.P. v. Argentine Republic* (Award) ICSID Case No. ARB/01/3 (22 May 2007), para. 337; WTO, *United States: Large Civil Aircraft (2nd complaint)*, Report of the Panel (22 October 2010), WT/DS353/R, para. 7.953, footnote 2420.

[228] Villiger (see footnote 153) p. 431.

[229] Linderfalk, *On the Interpretation of Treaties* (see footnote 173) p. 166.

[230] *Japan: Alcoholic Beverages II*, Appellate Body (see footnote 31) sect. E.

109. If, however, the concept of subsequent practice is divulged from a possible agreement between the parties, as it is recognized by international adjudicatory bodies, frequency is not a necessary element of the definition of the concept of "subsequent practice".[231]

110. Thus, "subsequent practice" in the broad sense covers any application of the treaty by one or more parties. It can take various forms.[232] Practice may either consist of a direct application of the respective treaty or be a statement regarding the interpretation or application of the treaty. Such practice may include official statements concerning the treaty's meaning, protests against non-performance, or tacit consent to statements or acts by other parties.[233]

(b) Relational character

111. Like a subsequent agreement under article 31 (3) (a) of the Vienna Convention, subsequent practice must be "in the application of the treaty". This is true not only for agreed subsequent practice within the meaning of article 31 (3) (b) of the Vienna Convention, but also for subsequent practice generally. Thus, action or relevant silence[234] must be taken in application of the treaty, including the invocation of provisions of the treaty; the same is true for pronouncements regarding the treaty in the course of a legal dispute or at a diplomatic conference; official communications for which the treaty gives cause; or the enactment of domestic legislation or conclusion of new international agreements for the purpose of implementing a treaty.

112. It should be mentioned, however, that a NAFTA Panel has denied that domestic legislation can be used as an interpretative aid:

> Finally, in light of the fact that both Parties have made references to their national legislation on land transportation, the Panel deems it appropriate to refer to Article 27 of the Vienna Convention, which states that "A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty." This provision directs the Panel not to examine national laws but the applicable international law. Thus, neither the internal law of the United States nor the Mexican law should be utilized for the interpretation of NAFTA. To do so would be to apply an inappropriate legal framework.[235]

113. While the rule contained in article 27 of the Vienna Convention is certainly valid and important, it does not follow from it that national law may not be taken into account as a possible interpretative aid in the form of subsequent State practice in the implementation of the treaty. Other international adjudicatory bodies, in particular in the context of the WTO and the European Court of Human Rights, have

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[231] Robert Kolb, *Interprétation et création du droit international* (Bruylant, 2006), pp. 506f.

[232] Anthony Aust, *Modern Treaty Law and Practice* (Cambridge University Press, 2000), p. 191.

[233] Wolfram Karl (see footnote 160), p. 114.

[234] *Yearbook of the International Law Commission* (1966), vol. II, p. 222, para. 15; *Case concerning the Temple of Preah Vihear (Cambodia v. Thailand)* (Merits) [1962], *I.C.J. Reports 1962*, p. 23; *Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)* (Jurisdiction and Admissibility) [1984], *I.C.J. Reports 1984*, p. 410, para. 39; *Dispute between Argentina and Chile concerning the Beagle Channel* (1977), *Reports of International Arbitral Awards*, vol. XXI, part II, paras. 168 and 169; the role of silence will be elaborated upon in greater detail in the next report on the topic.

[235] In the matter of *Cross-Border Trucking Services* (see footnote 86), para. 224.

recognized and regularly distinguish between national legislation (and other implementing measures at the national level) which violates treaty obligations, and national legislation and measures which can serve as a means to interpret the treaty.[236]

114. Subsequent practice for the purpose of treaty interpretation should, on the other hand, be distinguished from other, less immediate subsequent developments which may or may not have an influence on treaty interpretation. This is because subsequent agreements and subsequent practice of parties "regarding the interpretation of a treaty" contribute at least potentially to an "authentic" element to treaty interpretation. While there may ultimately be no clear dividing line between subsequent practice by the parties which specifically relate to a treaty and practice which bears some meaningful relationship with that treaty, it nevertheless makes sense to distinguish between both categories. Only such conduct which the parties undertake "regarding the interpretation of the treaty" should benefit from being treated as an "authentic" contribution to interpretation.

115. It is also not always easy to distinguish subsequent agreements and subsequent practice from subsequent "other relevant rules of international law applicable in the relations between the parties" (article 31 (3) (c)). It appears that the most important distinguishing factor is whether an agreement is made "regarding the interpretation" of a treaty.

(c) Subsequent

116. As with regard to subsequent agreements, relevant interpretative practice is "subsequent" if it has taken place "after the conclusion of the treaty",[237] that is, after the text of the treaty has been established as definite.[238]

(d) Actors

117. An important question relates to the actors who may perform relevant subsequent practice. Article 31 (3) (b) of the Vienna Convention does not explicitly require that it must be the practice of the parties to the treaty themselves, but the provision seems to imply this requirement. It is certainly the parties themselves, acting through their organs,[239] who are competent to engage in interpretative treaty practice and to apply or to comment upon a treaty. However, it is also not excluded that private (natural and legal) persons "apply" a treaty in certain cases. Such non-State practice, however, needs to be attributable to a particular State party in

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[236] See, for example, *United States: Section 110(5) Copyright Act — Panel* (footnote 220), para. 6.55; *United States: Continued Zeroing Methodology*, Report of the Panel, WT/DS350/R, para. 7.217; WTO, *United States: Anti-Dumping and Countervailing Duties (China)*, Report of the Appellate Body (11 March 2011) WT/DS379/AB/R, paras. 335 and 336; *CMS Gas Transmission Company v. Argentine Republic* (see footnote 197), para. 47; *V v. the United Kingdom* [GC] Application No. 24888/94, ECHR 1999-IX, para. 73; *Kart v. Turkey* [GC] Application No. 8917/05 (ECtHR, 13 December 2009), para. 54, selected for publication in *Reports of Judgments and Decisions*; *Sigurjónsson* (see footnote 203), para. 35; *A v. the United Kingdom* (see footnote 203), para. 80.

[237] *Yearbook of the International Law Commission* (1966), vol. II, p. 221, para. 14.

[238] See paras. 84-87 above.

[239] Karl (see footnote 160), p. 115f.

order to be relevant for the purpose of establishing an authentic element of interpretation.[240] This point is developed below in section VI (draft conclusion 4).

3. Conclusion: draft conclusion 3

118. Taken together, these sources and considerations suggest the following draft conclusion 3:[241]

> **Draft conclusion 3**
> **Definition of subsequent agreement and subsequent practice as means of treaty interpretation**
>
> *For the purpose of treaty interpretation a "subsequent agreement" is a manifested agreement between the parties after the conclusion of a treaty regarding its interpretation or the application of its provisions.*
>
> *For the purpose of treaty interpretation "subsequent practice" consists of conduct, including pronouncements, by one or more parties to the treaty after its conclusion regarding its interpretation or application.*
>
> *Subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation is a means of interpretation according to article 31 (3) (b) of the Vienna Convention. Other subsequent practice may under certain circumstances be used as a supplementary means of interpretation according to article 32 of the Vienna Convention.*

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[240] See paras. 119-144 below.

[241] See preliminary conclusions 5 and 8 of the Chair of the Study Group on Treaties over time (A/66/10, para. 344), in particular, preliminary conclusion 5:

> **(5) Concept of subsequent practice as a means of interpretation**
>
> Most adjudicatory bodies reviewed have not defined the concept of subsequent practice. The definition given by the WTO Appellate Body ("concordant, common and consistent sequence of acts or pronouncements which is sufficient to establish a discernable pattern implying the agreement of the parties [to the treaty] regarding its interpretation") combines the element of "practice" ("sequence of acts or pronouncements") with the requirement of agreement ("concordant, common") as provided for in Article 31 (3) (b) VCLT (subsequent practice in a narrow sense). Other adjudicatory bodies reviewed have, however, also used the concept of "practice" as a means of interpretation without referring to and requiring a discernable agreement between the parties (subsequent practice in a broad sense).

VI. Attribution of treaty-related practice to a State

119. Whereas article 31 (3) (a) of the Vienna Convention speaks of any subsequent agreement "between the parties", article 31 (3) (b) merely speaks of "subsequent practice in the application of the treaty". This raises the question under which circumstances practice "in the application of the treaty" can be attributed to a State and thus be relevant interpretative State practice (1). Related questions are whether social developments (2) and practice by other actors than States (3) can also be relevant for the interpretation of a treaty and, in particular, whether they "can establish the agreement of the parties regarding its interpretation".

1. Scope of relevant State practice

120. Whether a certain conduct amounts to a relevant subsequent treaty practice by a State depends, inter alia, on the applicable rules of attribution. In its articles on State Responsibility for internationally wrongful acts (ASR) the Commission has adopted rules on the attribution of conduct to a State.[242] The determination of State responsibility, however, serves a different purpose than the attribution of practice for the purpose of identifying relevant interpretative practice. The range of possible wrongful acts by a State is necessarily much wider than those which are "in application of" a treaty. It is, for example, difficult to conceive of a relevant treaty practice by way of the "conduct of an organ of a State" which "exceeds its authority" (article 7 ASR), or by way of the "conduct of an insurrectional movement" (article 10 ASR).

121. The pertinent rules of attribution for the present purpose of treaty interpretation must therefore be derived from the specific character of the interpretation and the application of treaties by their parties. This suggests that only such conduct which is undertaken or deemed to be accepted by those organs of a State party which are internationally regarded as being responsible for the application of the treaty (as a whole, or of a particular provision of a treaty) may be attributed to a State. Subsequent practice of States may certainly be performed by high-ranking government officials in the sense of article 7 of the Vienna Convention. Yet, since many treaties are typically not applied by high government officials, international courts and tribunals have recognized that the conduct of minor authorities, or even other actors, can also be relevant subsequent conduct for the interpretation of a treaty. Thus, ICJ has recognized in the case concerning the rights *of Nationals of the United States of America in Morocco* that article 95 of the Act of Algeciras had to be interpreted flexibly in light of the inconsistent practice of local customs authorities.[243] In the *Kasikili/Sedudu* case, ICJ even considered that the regular use of an island on the border between Namibia (former South-West Africa) and Botswana (former Bechuanaland) by members of a local tribe, the Masubia, could be regarded as subsequent practice in the sense of article 31 (3) (b) of the Vienna Convention if it:

> was linked to a belief on the part of the Caprivi authorities that the boundary laid down by the 1890 Treaty followed the Southern Channel of the Chobe,

[242] General Assembly resolution 56/83, annex.

[243] *Case concerning Rights of Nationals of the United States of America in Morocco (France v. United States of America)* [1952] *I.C.J. Reports 1952*, p. 211.

> and second, that the Bechuanaland authorities were fully aware and accepted this as a confirmation of the treaty boundary.[244]

122. The *Temple* case, however, illustrates that situations may arise in which the conduct of minor officials and local practice cannot be attributed to the State. Trying to defend a boundary, Thailand argued that certain maps, delivered by France and apparently deviating from the line which had originally been agreed on, had only been "seen" by Siamese officials of lower rank who were not in a position to agree on behalf of Siam with the boundary line as it was drawn on the maps. By holding that:

> If the Siamese authorities did show these maps only to minor officials, they clearly acted at their own risk, and the claim by Thailand could not, on the international plane, derive any assistance from that fact.[245]

The Court thus seems to have implied that if the higher authorities had no knowledge of the map, the knowledge or conduct of minor officials alone would not have been attributed to Thailand.

123. The jurisprudence of arbitral tribunals confirms that relevant subsequent practice can emanate from lower government officials if they can be internationally expected as being responsible for the application of the treaty. In the *German External Debts* award the Arbitral Tribunal considered a letter of the Bank of England to the German Federal Debt Administration as relevant subsequent practice.[246] And in the case concerning the *Tax regime governing pensions paid to retired UNESCO officials residing in France*, the Arbitral Tribunal accepted, in principle, the practice of the French tax administration of not collecting taxes on the pensions of retired UNESCO employees as being relevant subsequent practice, but ultimately considered a few official pronouncements by a higher authority, the French government, to be decisive.[247]

124. It follows that the practice of lower and local authorities in the application of a treaty can be considered to be relevant subsequent practice for the purpose of treaty interpretation when the higher authorities can be expected to be aware of this practice and to accept it as an element of treaty interpretation or application.[248]

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[244] *Case concerning Kasikili/Sedudu Island (Botswana v. Namibia)* [1999] *I.C.J. Reports 1999*, p. 1095, para. 74.

[245] *Case concerning the Temple of Preah Vihear* (see footnote 139), p. 25.

[246] *Case concerning the question whether the re-evaluation of the German Mark in 1961 and 1969 constitutes a case for application of the clause in article 2 (e) of Annex I A of the 1953 Agreement on German External Debts between Belgium, France, Switzerland, the United Kingdom of Great Britain and Northern Ireland and the United States of America on the one hand and the Federal Republic of Germany on the other*, Award of 16 May 1980, *Reports of International Arbitral Awards*, vol. XIX, part III, p. 103, para. 31.

[247] *Question of the tax regime governing pensions paid to retired UNESCO officials residing in France*, Award of 14 January 2003, *Reports of International Arbitral Awards*, vol. XXV, part IV, p. 257, para. 66 and p. 259, para. 74.

[248] See also M. Kamto, "La volonté de l'État en droit international" (2004) *Recueil des Cours*, vol. 310, pp. 141-144.

2. Attribution of subsequent conduct by private actors and social developments to States

125. "Subsequent practice in the application of a treaty" will normally be brought about by those who are called by the treaty to apply it, which are the States parties themselves. It is nevertheless also conceivable that "the agreement of the parties regarding its interpretation" is "established" indirectly by way of the practice of other actors. So far, however, such practice by other actors has only to a very limited extent been judicially recognized as being attributable to a State party for the purpose of treaty interpretation.

126. The Iran-United States Claims Tribunal, being concerned with matters which involve a close cooperation between State organs and private entities, has been confronted with the question of whether certain conduct by private entities could be attributed to one of the two States for the purpose of determining relevant subsequent State practice:

> It is a recognized principle of treaty interpretation to take into account, together with the context, any subsequent practice in the application of an international treaty. This practice must, however, be a practice of the parties to the treaty and one which establishes the agreement of the parties regarding the interpretation of that treaty. Whereas one of the participants in the settlement negotiations, namely Bank Markazi, is an entity of Iran and thus its practice can be attributed to Iran as one of the parties to the Algiers Declarations, the other participants in the settlement negotiations and in actual settlements, namely the United States banks, are not entities of the Government of the United States, and their practice cannot be attributed as such to the United States as the other party to the Algiers Declarations.[249]

127. This approach was criticized by Judge Ansari who in his dissenting opinion held that the role of supervisory State organs should have been taken into account by the majority:

> Iran has further argued that the subsequent practice of the parties during their settlement negotiations shall be given due consideration with respect to the interpretation of the "Undertakings". In support of this argument Iran has furnished the Tribunal with settlement agreements reached in pursuance of the "Undertakings" and as a result of which Iran was paid fresh money directly by the U.S. banks. The said agreements by their very terms could not become operative without the approval of the United States Treasury and the Federal Reserve Bank of New York (The "Fed") acting as the fiscal agent of the United

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[249] *The United States of America (and others)* and *the Islamic Republic of Iran (and others)* (see footnote 81), p. 71; similarly *the Islamic Republic of Iran v. the United States of America*, Interlocutory Award No. ITL 83-B1-FT (Counterclaim) (9 September 2004) (Iran-USCTR) paras. 127 and 128; see also Dissenting Opinion of President Lagergren in *International Schools Services, Inc. (ISS)* and *National Iranian Copper Industries Company (NICICO)* (see footnote 81), pp. 348 and 353: "the provision in the Vienna Convention on subsequent agreements refers to agreements between States parties to a treaty, and a settlement agreement between two arbitrating parties can hardly be regarded as equal to an agreement between the two States that are parties to the treaty, even though the Islamic Republic of Iran was one of the arbitrating parties in the case".

> States. Such subsequent practice of the parties is decisive and provides additional evidence in support of Iran's argument.[250]

128. While the dissenting opinion raises an important consideration, it seems that the State involvement "by supervision" was not meant, in this particular context, to make a pronouncement regarding interpretation towards the other State and was therefore not sufficient to attribute the conduct of the private entities to the State for the purpose of treaty interpretation.

129. The European Court of Human Rights seems to be the only[251] international judicial body to have occasionally considered "increased social acceptance"[252] (of certain behaviour or personal characteristics) and "major social changes"[253] to be relevant, for the purpose of treaty interpretation, without clearly linking such developments in society to specific decisions of State organs. The two most important[254] cases are *Dudgeon v. the United Kingdom*[255] and *Christine Goodwin v. the United Kingdom*.[256]

130. *Dudgeon v. the United Kingdom* concerned the right of mutually consenting adult homosexuals not to be criminalized for their sexual intercourse. The Court held with respect to the Northern Irish legislation at the time that "as compared with the era when that legislation was enacted, there is now a better understanding, and in consequence an increased tolerance, of homosexual behaviour".[257] The Court based this assertion on the fact

> that in the great majority of the member States of the Council of Europe it is no longer considered to be necessary or appropriate to treat homosexual practices of the kind now in question as in themselves a matter to which the sanctions of the criminal law should be applied; the Court cannot overlook the marked changes which have occurred in this regard in the domestic law of the member States.[258]

131. *Christine Goodwin v. the United Kingdom* concerned the right of transsexuals to marry in their assigned gender.[259] In this case the Court stated that it "must have regard to the changing conditions within the respondent State and within Contracting States generally"[260] and admonished the respondent State that it:

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[250] Dissenting Opinion of Parviz Ansari in *The United States of America (and others)* and *The Islamic Republic of Iran (and others)*, Award No. 108-A-16/582/591-FT (1985), 9 Iran-USCTR, pp. 97 and 99.

[251] See, however, WTO, *United States: Certain Country of Origin*, Report of the Appellate Body (29 June 2012), WT/DS384/AB/R and WT/DS386/AB/R, para. 448.

[252] *Christine Goodwin v. the United Kingdom*, ECHR 2002-VI, para. 85.

[253] *Christine Goodwin* (see footnote 252), para. 100.

[254] See also *I. v. the United Kingdom* [GC] Application No. 25680/94 (ECtHR, 11 July 2002), para. 65; *Burden and Burden v. the United Kingdom*, Application No. 13378/05 (ECtHR, 12 December 2006), para. 57; *Shackell v. the United Kingdom* (Decision) Application No. 45851/99 (ECtHR, 27 April 2000), para. 1; *Schalk and Kopf v. Austria*, Application No. 30141/04 (ECtHR, 24 June 2010), para. 58, selected for publication in *Reports of Judgments and Decisions*, citing *Christine Goodwin* (see footnote 252), para. 100.

[255] *Dudgeon v. the United Kingdom* (1981) (ECtHR), Series A, No. 45.

[256] *Christine Goodwin* (see footnote 252).

[257] *Dudgeon* (see footnote 255), para. 60.

[258] Ibid.

[259] *Christine Goodwin* (see footnote 252).

[260] Ibid., para. 74.

> had not yet taken any steps to (...) [keep the need for appropriate legal measures under review] despite an increase in the social acceptance of the phenomenon of transsexualism and a growing recognition of the problems with which transsexuals are confronted.[261]

132. A close analysis of the Court's case law, however, reveals that the invocation by the Court, for the purpose of treaty interpretation, of "social changes" or "social acceptance" ultimately remained linked to State practice. In *Dudgeon v. the United Kingdom* the Court demonstrated the "increased tolerance of homosexual behaviour" by pointing to the fact "that in the great majority of the member States of the Council of Europe it is no longer considered to be necessary or appropriate to treat homosexual practices of the kind now in question as in themselves a matter to which the sanctions of the criminal law should be applied" and that it could therefore not "overlook the marked changes which have occurred in this regard in the domestic law of the member States".[262] The Court further pointed to the fact that "in Northern Ireland itself, the authorities have refrained in recent years from enforcing the law".[263] Even in *Christine Goodwin v. the United Kingdom* the Court attached importance "to the clear and uncontested evidence of a continuing international trend in favour not only of increased social acceptance of transsexuals but of legal recognition of the new sexual identity of post-operative transsexuals".[264]

133. Invocation of "social acceptance" by the European Court of Human Rights is rare and has been limited to cases which concerned marginal groups whose situations had not been fully considered within the political and legal system of the State concerned.[265] In contrast, the Court does not rely on politically contested social developments. In *Johnston v. Ireland*, for example, which concerned the claim that the right to marry implied the right to have a divorce in order to be able to remarry, "the applicants set considerable store on the social developments that have occurred since the Convention was drafted, notably an alleged substantial increase in marriage breakdown".[266] The Court, however, while recognizing "that the Convention and its Protocols must be interpreted in the light of present-day conditions" refused to take a closer look at those "social developments" and concluded that it could not "by means of an evolutive interpretation, derive from these instruments a right that was not included therein at the outset".[267] In the same vein, the Court held in *Schalk and Kopf v. Austria*:

> although, as it noted in *Christine Goodwin*, the institution of marriage has undergone major social changes since the adoption of the Convention, the Court note[s] that there is no European consensus regarding same-sex marriage. At present no more than six out of forty-seven Convention States allow same-sex marriage.[268]

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[261] Ibid., para. 92.

[262] *Dudgeon* (see footnote 255), para. 60.

[263] Ibid.

[264] *Christine Goodwin* (see footnote 252), para. 85, see also para. 90.

[265] See Jeffrey A. Brauch, "The Margin of Appreciation and the Jurisprudence of the European Court of Human Rights" (2004), *Columbia Journal of International Law*, vol. 11, p. 145.

[266] *Johnston* (see footnote 42), para. 53.

[267] Ibid.

[268] *Schalk* (see footnote 254), para. 58.

134. Thus, the Court typically determines, explicitly or implicitly, whether social developments are actually reflected in State practice and it takes this reflection in legislative or administrative practice as being the most relevant indicator.[269] This was true, for example, in cases concerning the status of children born out of wedlock[270] and in cases which concerned the alleged right of Gypsy people to have a temporary place of residence assigned by municipalities in order to be able to pursue their itinerant lifestyle.[271] The European Court of Human Rights has only exceptionally implied that the existence of contrary legislation in the respondent State was due to administrative or legislative inertia and did not anymore reflect the considered view of the responsible State bodies.[272] It can therefore be concluded that mere (subsequent) social practice, as such, is not sufficient to constitute relevant subsequent treaty practice but that it must be supported by some form of accompanying State practice.

3. Practice of other actors as evidence of State practice

135. Subsequent practice of the parties to a treaty can be reflected in, or be initiated by the pronouncements or conduct of other actors, such as international organizations or non-State actors. Such initiation of subsequent practice of the parties by international organizations or by non-governmental organizations should not, however, be confounded with the practice by the parties to the treaty themselves. Activities of other bodies may rather constitute evidence of a subsequent agreement or practice of the parties in question.

(a) International organizations

136. Decisions, resolutions and other practice by international organizations can possess relevance for the interpretation of treaties in their own right. This is recognized, for example, in article 2 (j) of the Vienna Convention on the Law of Treaties between States and International Organizations and between International Organizations of 1986, which mentions the "established practice of the organization" as one form of the "rules of the organization". This aspect of subsequent practice to a treaty will be the subject of a later report. Here, the focus is limited to whether the practice of international organizations may be indicative of, or evidence for, relevant State treaty practice.

137. In this sense, collections and other reports by international organizations on subsequent State practice can possess, more or less, evidentiary weight. Reports by

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[269] But see George Letsas, "Strasbourg's Interpretative Ethic: Lessons for the International Lawyer" (2010) *European Journal of International Law*, vol. 21, No. 3, p. 530.

[270] *Mazurek v. France*, ECHR 2000-II, para. 52 ("The Court notes at the outset that the institution of the family is not fixed, be it historically, sociologically or even legally"); see also *Marckx v. Belgium* (1979) Series A, No. 31, para. 41; *Inze v. Austria* (1987) Series A, No. 126, para. 44; and *Brauer v. Germany*, Application No. 3545/04 (ECtHR, 28 May 2009) para. 40, selected for publication in *Reports of Judgments and Decisions*.

[271] *Chapman v. the United Kingdom* [GC] ECHR 2001-I-18, paras. 70 and 93; see also *Lee v. the United Kingdom* [GC] Application No. 25289/94 (ECtHR, 18 January 2001) paras. 95 and 96; *Beard v. the United Kingdom* [GC] Application No. 24882/94 (ECtHR, 18 January 2001) paras. 104 and 105; *Coster v. the United Kingdom* [GC] Application No. 24876/94 (ECtHR, 18 January 2001) paras. 107 and 108; and *Jane Smith v. the United Kingdom* [GC] Application No. 25154/94 (ECtHR, 18 January 2001) paras. 100 and 101.

[272] *Christine Goodwin* (see footnote 252), para. 92.

organizations at the universal level which are prepared on the basis of a specific mandate to provide accounts on the State practice in a particular field enjoy considerable authority without necessarily being authoritative in all cases. For example, State officials who are responsible for interpreting and applying the Convention relating to the Status of Refugees resort to the Office of the United Nations High Commissioner for Refugees (UNHCR) *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees* as a reference work for State practice.[273] Although the UNHCR Handbook is sometimes loosely referred to as if it would itself express State practice, this view has correctly been rejected by the Federal Court of Australia in *Semunigus v. the Minister for Immigration and Multicultural Affairs*.[274] Another example is the work of the United Nations Security Council Committee established pursuant to resolution 1540 (2004)[275] which has proved to be of relevance for the interpretation of the 1972 Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological and Toxin Weapons and on Their Destruction.[276] As part of its work on the implementation of Security Council resolution 1540 (2004), the Committee entertains a systematic compilation of implementation measures taken by member States, the so-called 1540 matrix.[277] As far as the matrix relates to the implementation of the Biological Weapons Convention, as well as to the 1993 Chemical Weapons Convention,[278] it is a source of evidence of subsequent State practice with regard to the said treaties.[279]

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[273] See UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees* (January 1992 — re-edited) (HCR/IP/4/Eng/REV.1) foreword at para. VII; see also Gardiner (footnote 171), p. 239.

[274] Federal Court of Australia, *Semunigus v. the Minister for Immigration and Multicultural Affairs* [1999] FCA 422 (14 April 1999) paras. 5-13; this does not exclude that the Handbook possesses considerable evidentiary weight as a correct statement of subsequent State practice. Its authority is based not only on its quality as a professional collection, but also on article 35(1) of the Convention relating to the Status of Refugees according to which "the Contracting States undertake to cooperate with the Office of the United Nations High (...) in the exercise of its functions, and shall in particular facilitate its duty of supervising the application of the provisions of this Convention".

[275] Security Council resolution 1540 (2004), para. 8 (c).

[276] Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction (Biological Weapons Convention) (adopted 10 April 1972, entered into force 26 March 1975) United Nations, *Treaty Series*, vol. 1015, No. 14860.

[277] According to the 1540 Committee's webpage, "the 1540 Matrix has functioned as the primary method used by the 1540 Committee to organize information about implementation of United Nations Security Council resolution 1540 (2004) by Member States (...) The 1540 Committee uses the matrices as a reference tool to examine the status of implementation of Security Council resolution 1540 and in its dialogue with States as a tool to identify lacunae existing at national level and facilitate technical assistance". (see http://www.un.org/en/sc/1540/1540/national-implementation/matrix/shtml, accessed 30 March 2012).

[278] Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction (Chemical Weapons Convention) (adopted 13 January 1993, entered into force on 29 April 1997) United Nations, *Treaty Series*, vol. 1974, No. 33757.

[279] See Gardiner (footnote 171), p. 239.

(b) Non-governmental organizations

138. Non-governmental organizations can play an important role in collecting subsequent practice, in particular through the monitoring of the implementation practice of a specific treaty.

139. This is the case, for example, for the Landmine and Cluster Munition Monitor, which is a joint initiative of the International Campaign to Ban Landmines and the Cluster Munition Coalition. The Monitor is described as the "de facto monitoring regime"[280] for the 1997 Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on Their Destruction (Ottawa Convention)[281] and the 2008 Convention on Cluster Munitions (Dublin Convention).[282] Apart from providing country profiles for States parties, signatories, States not parties and "Other Areas",[283] the Cluster Munition Monitor 2011 identifies different interpretative issues concerning the Dublin Convention, and lists pertinent statements and practice by States parties and signatories. These concern: the prohibition on assistance and interoperability; foreign stockpiling and transit; and the issue of disinvestment.[284]

140. The example of the Landmine and Cluster Munition Monitor shows that non-governmental organizations can provide a source of evidence for subsequent practice of State parties and even solicit its coming into being. In fact, by urging States to provide their views on certain issues, the amount of evidence for practice available to interpreters can be increased considerably. The example also demonstrates that non-governmental organizations can try to shape subsequent practice by providing their reading of disputed provisions. Indeed, such organizations can pursue their own agenda, which may be different from that of States. This may result in a certain bias in their research, which needs to be critically reviewed. This does not exclude the fact that State practice gathered by non-governmental organizations is often a valuable source of evidence for the subsequent practice of all the parties and that it enhances transparency, which in turn tends to increase compliance.

(c) The special role of the International Committee of the Red Cross

141. The role which the International Committee of the Red Cross (ICRC) assumes with regard to the Geneva Conventions and the Additional Protocols is a case apart. ICRC, formally a private, non-profit association incorporated under Swiss domestic law,[285] has been a catalyst in the development of international humanitarian law

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[280] See at http://www.the-monitor.org, accessed 18 March 2012.

[281] Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction (adopted 18 September 1997, entered into force 1 March 1999) United Nations, *Treaty Series*, vol. 2056, No. 35597.

[282] Convention on Cluster Munitions (adopted 30 May 2008, entered into force 1 August 2010) (A/C.1/63/5, enclosure, part II).

[283] Cluster Munition Monitor 2011, pp. 59-344 (http://www.the-monitor.org/cmm/2011/pdf/Cluster_Munition_Monitor_2011.pdf, accessed 18 March 2012).

[284] Ibid., pp. 24-31; the same interpretative issues have already been assessed in the 2009 and 2010 reports.

[285] Hans-Peter Gasser, "International Committee of the Red Cross (ICRC)", para. 20, in *Max Planck Encyclopedia of Public International Law* (http://www.mpepil.com, accessed 25 March 2012) para. 20.

treaties since the original Geneva Convention of 1864.[286] ICRC has the legal personality in international law as the entity responsible for carrying out the mandate conferred on it by the international community through the Geneva Conventions and by the statutes of the International Red Cross and Red Crescent Movement.[287] In addition, ICRC occasionally provides interpretative guidance on the Geneva Conventions and the Additional Protocols, a mandate it derives from the statutes of the Movement, adopted at the 25th International Conference of the Red Cross at Geneva in 1986 and amended in 1995 and 2006.[288] Article 5 (2) (g) of the statutes provides:

> The role of the International Committee, in accordance with its Statutes, is in particular: (...) (g) to work for the *understanding* and dissemination of knowledge of international humanitarian law applicable in armed conflicts and to prepare any development thereof.[289]

142. In 2009, ICRC published, on the basis of its mandate,[290] a note on "Interpretative guidance on the notion of direct participation in hostilities under international humanitarian law".[291] The guidance is the outcome of an "expert process" conducted from 2003 to 2008 drawing from academic, military, governmental and non-governmental circles, all participating in their private capacity, but ostensibly basing their analysis on State treaty and customary practice. The interpretative guidance consists of 10 recommendations with accompanying commentary and "reflect[s] the ICRC's institutional position as to how existing international humanitarian law should be interpreted".[292] It is too early for a general assessment of the significance of the Guidance, but its impact on the subsequent practice of States will be of interest.

143. In this context, States have reaffirmed their role in the development of international humanitarian law. While resolution 1 of the 31st International Red Cross and Red Crescent Conference of 2011 recalls "that one of the important roles of the ICRC (...) is in particular 'to work for the understanding and dissemination of knowledge of international humanitarian law applicable in armed conflicts and to prepare any development thereof'" it also emphasizes "the primary role of States in the development of international humanitarian law".[293] It should be noted that ICRC purports to interpret international humanitarian law as such, and not only the

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[286] Ibid., para. 14.

[287] Ibid., para. 25.

[288] See www.icrc.org/eng/assets/files/other/statutes-en-a5.pdf, accessed 25 March 2012.

[289] Emphasis added.

[290] "[T]he responsibility for the interpretive guidance is assumed by ICRC as a neutral and independent humanitarian organization mandated by the international community of States to promote and work for a better understanding of international humanitarian law," citing article 5 (2) (c) and (g) of the statutes of the Movement (electronic version www.icrc.org/eng/assets/files/other/icrc-002-0990.pdf, accessed 25 March 2012).

[291] ICRC, Interpretive guidance on the notion of direct participation in hostilities under international humanitarian law; for the expert process, see http://www.icrc.org/eng/resources/documents/article/other/direct-participation-article-020709.htm, accessed 25 March 2012.

[292] Ibid., p. 9.

[293] 31st International Conference 2011: Resolution 1 — Strengthening legal protection for victims of armed conflicts (1 December 2012) (http://www.icrc.org/eng/resources/documents/resolution/31-international-conference-resolution-1-2011.htm, accessed 25 March 2012).

Geneva Conventions and the Additional Protocols.[294] The distinction between subsequent practice of States parties pursuant to treaties and pursuant to general customary practice may thus be blurred.

4. Conclusion: draft conclusion 4

144. Taken together, these sources and considerations suggest the following draft conclusion:[295]

Draft conclusion 4
Possible authors and attribution of subsequent practice

Subsequent practice can consist of conduct of all State organs which can be attributed to a State for the purpose of treaty interpretation.

Subsequent practice by non-State actors, including social practice, may be taken into account for the purpose of treaty interpretation as far as it is reflected in or adopted by subsequent State practice, or as evidence of such State practice.

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[294] See ICRC, Interpretive guidance on the notion of direct participation in hostilities under international humanitarian law (footnote 290), p. 9.

[295] See preliminary conclusion 9 of the Chair of the Study Group on Treaties over time, A/66/10, para. 344:

> **(9) Possible authors of relevant subsequent practice**
>
> Relevant subsequent practice can consist of acts of all State organs (executive, legislative, and judicial) which can be attributed to a State for the purpose of treaty interpretation. Such practice may under certain circumstances even include "social practice" as far as it is reflected in State practice.

VII. Future programme of work

145. The Special Rapporteur proposes to submit, for the session in 2014, his second report on further aspects of the topic, most of which have been addressed in his three reports for the Study Group on Treaties over time[296] and which the Study Group has, in part, discussed in 2011 and 2012.[297] In 2015, he envisages submitting the third report, in which he will discuss the practice of international organizations and on the jurisprudence of national courts.[298] In 2016, the Special Rapporteur will submit a final report, with revised conclusions and commentaries, in particular taking account of the discussions in the Commission and the debates in the Sixth Committee.

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[296] See footnotes 4, 5 and 10.

[297] A/66/10, paras. 336-341; and A/67/10, paras. 225-240.

[298] As it was envisaged in the original proposal, see A/63/10, annex A, paras. 17, 18, 39 and 42.

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Second report on the immunity of State officials from foreign criminal jurisdiction

By Concepción Escobar Hernández, Special Rapporteur

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I. Introduction

1. The topic "Immunity of State officials from foreign criminal jurisdiction" was included in the long-term programme of work of the International Law Commission at its fifty-eighth session (2006) on the basis of a proposal contained in annex A to the report of the Commission on the work of that session.[1] At its fifty-ninth session (2007), the Commission decided to include this topic in its programme of work and appointed Roman A. Kolodkin as Special Rapporteur.[2] At the same session, the Secretariat was requested to prepare a background study on the topic.[3]

2. The former Special Rapporteur submitted three reports, in which he established the boundaries within which the topic should be considered, analysed a number of substantive issues in connection with the immunity of State officials from foreign criminal jurisdiction and examined the procedural issues related to this type of immunity.[4] The Commission considered the reports of the Special Rapporteur at its sixtieth and sixty-third sessions, held in 2008 and 2011, respectively. The Sixth Committee of the General Assembly dealt with the topic during its consideration of the report of the International Law Commission, particularly in 2008 and 2011.

3. At its 3132nd meeting, held on 22 May 2012, the Commission appointed Ms. Concepción Escobar Hernández as Special Rapporteur to replace Mr. Kolodkin, who was no longer a member of the Commission.[5] Following her appointment, the Special Rapporteur held a first set of informal consultations with the members of the Commission on 30 May 2012 on the basis of a list of questions which she had submitted in an informal working paper and which were included in the preliminary report.[6]

4. The Special Rapporteur submitted a preliminary report on the immunity of State officials from foreign criminal jurisdiction (A/CN.4/654), which the Commission considered during the second part of its sixty-fourth session, held in 2012.[7]

5. The preliminary report was a "transitional report", in which the Special Rapporteur sought "to help clarify the terms of the debate up to this point and to identify the principal points of contention which remain and on which the Commission may wish to continue to work in the future" (para. 5). To that end, the preliminary report reviewed the consideration of the topic of the immunity of State officials from foreign criminal jurisdiction during the quinquennium 2007-2011 on three levels: (a) the work carried out by the former Special Rapporteur; (b) the debate in the International Law Commission; and (c) the debate in the Sixth Committee.

6. On the basis of these elements, the preliminary report identified a number of issues for consideration, on which no consensus had been reached during the previous quinquennium and which affected almost all of the issues covered in the former Special Rapporteur's three reports. As a result of this review, the Special

[1] See A/61/10, para. 257 and annex A.
[2] See A/62/10, para. 376.
[3] See A/62/10, para. 386. For the Secretariat study, see A/CN.4/596 and Corr. 1.
[4] For Special Rapporteur Kolodkin's reports, see A/CN.4/601, A/CN.4/631 and A/CN.4/646.
[5] See A/67/10, para. 84.
[6] See A/CN.4/654, para. 73.
[7] See A/67/10, paras. 86 to 139.

Rapporteur divided these issues into four groups,[8] to be considered over the current quinquennium:

1. General issues of a methodological and conceptual nature:

   1.1. The distinction between immunity *ratione materiae* and immunity *ratione personae* and the implications of that distinction

   1.2. Immunity in the system of values and principles of contemporary international law

   1.3. The relationship between immunity, on the one hand, and the responsibility of States and the criminal responsibility of individuals, on the other

2. Immunity *ratione personae*

   2.1. The persons who enjoy immunity

   2.2. The material scope of immunity: private acts and official acts

   2.3. The absolute or restricted nature of immunity and, in particular, the role that international crimes play or should play

3. Immunity *ratione materiae*

   3.1. The persons who enjoy immunity: the remaining terminological controversy and the definition of an "official"

   3.2. The definition of an "official act" and its relationship to the responsibility of the State

   3.3. The absolute or restricted nature of immunity: exceptions and international crimes

4. Procedural aspects of immunity.

7. The preliminary report also included certain methodological considerations that must be taken into account in the Commission's work on the topic covered in this report during the present quinquennium. These methodological considerations, which were set out by the Special Rapporteur in introducing her preliminary report to the Commission, can be summarized as follows:

(a) Future work on the topic should be based on the reports submitted previously by the former Special Rapporteur and on the Secretariat's study. However, bearing in mind that there are clear differences of opinion among members of the Commission and within the Sixth Committee, it should also take into consideration the various opinions expressed in both forums in order to move forward from the previous work of the Secretariat and the former Special Rapporteur;

(b) The topic of the immunity of State officials from foreign criminal jurisdiction must be approached from the perspective of both *lex lata* and *lex ferenda*, in other words, of both codification and progressive development. In any event, owing to the difficult and sensitive nature of the topic, it seems more appropriate to begin with *lex lata* considerations and, at a later date, to consider whether it is necessary and possible to formulate proposals *de lege ferenda*;

[8] See A/CN.4/654, para. 72.

(c) Consideration of the topic should take a consistently systemic approach, thus ensuring that any normative proposals made by the Commission fit seamlessly into the international legal system as a whole. Therefore, all the norms, principles and values of international law that are relevant to the topic under consideration must be taken into account;

(d) Matters related to the immunity of State officials from foreign criminal jurisdiction should be considered in a structured and progressive manner, addressing, step by step, the various issues included in the aforementioned four thematic groups;

(e) The Commission's consideration of the topic should include discussion of the draft articles contained in the annual reports prepared by the Special Rapporteur.

8. The Commission held an interesting debate on the preliminary report, covering the main issues raised therein from both a methodological and a substantive perspective.[9] Generally speaking, a methodological approach based on structured handling of the issues received widespread support. The majority also endorsed the systemic approach suggested by the Special Rapporteur, although some members of the Commission voiced reservations regarding inclusion of the principles and values of current international law as an analytical tool. With regard to substantive considerations, the various statements by members of the Commission revealed a broad consensus on the identification of issues that require further consideration during the present quinquennium. However, differences of opinion on substantive aspects of a number of issues raised in the preliminary report remained.

9. On the basis of this debate, the Commission decided to request States "to provide information on their national law and practice on the following questions:

(a) Does the distinction between immunity *ratione personae* and immunity *ratione materiae* result in different legal consequences and, if so, how are they treated differently?

(b) What criteria are used in identifying the persons covered by immunity *ratione personae*?[10]

The General Assembly also drew States' attention to the benefits of providing the Commission with the above information.[11] The Special Rapporteur would like to thank the States that responded to those questions in November 2012, during the discussions of the Sixth Committee, for their cooperation.

10. The Sixth Committee examined the preliminary report of the Special Rapporteur on the immunity of State officials from foreign criminal jurisdiction as part of its consideration of the report of the Commission during the sixty-seventh session of the General Assembly.[12] The interesting statements made during that

[9] For a summary of that debate, see A/67/10, paras. 86 to 189. See also the provisional summary records of the Commission (A/CN.4/SR.3143, A/CN.4/SR.3144, A/CN.4/SR.3145 and A/CN.4/SR.3146), available on the Commission's website (www.un.org/law/ilc/), and the provisional summary record of the 3147th meeting, which was not yet available on the Commission's website when this report was being finalized.

[10] See A/67/10, para. 28.

[11] See General Assembly resolution 67/92, para. 4.

[12] The Sixth Committee considered question of the immunity of State officials from foreign criminal jurisdiction at its 20th, 21st, 22nd and 23rd meetings during that session. In addition, two States referred to the question at the 19th meeting. The statements made by States at those meetings are reflected in summary records A/C.6/67/SR.19, A/C.6/67/SR.20 and A/C.6/67/SR.23. See also A/CN.4/657, section C, paras. 26 to 38.

discussion show that there is broad support for the methodological approaches outlined in the preliminary report and the workplan contained therein, including the proposal to organize future work around the introduction of draft articles. It should also be noted that many delegations endorsed the use of a dual methodological approach based on both codification and progressive development, including the prudent approach advocated by the Special Rapporteur in her preliminary report, in which she suggested that the work should begin with an analysis of *lex lata* and continue with proposals *de lege ferenda*.

11. With regard to the substantive issues outlined in the preliminary report, there was also extensive discussion of the key points on which there is still disagreement. In particular, the debate focused both directly and indirectly on exceptions to immunity, on the impact that new developments in international criminal law could or should have on the topic and on the growing importance of this new area within the overall system of contemporary international law. However, it should also be noted that there is still no consensus on the majority of the topic's substantive issues.

12. In any event, it should be noted that the States involved in the work of the Sixth Committee continue to attach great importance to the topic. This was demonstrated once again by General Assembly resolution 67/92, adopted by consensus on 14 December 2012, paragraph 8 of which "invites the Commission to continue to give priority to the topic 'Immunity of State officials from foreign criminal jurisdiction'".

II. Workplan and structure of this report

13. This report builds on the methodological approaches and general workplan set out in the preliminary report. It also takes into account the debates in both the Commission and the Sixth Committee in 2012 and, from a practical point of view, the need to provide the Commission with an operational tool so that it can begin discussions at this session. To that end, this report takes into consideration the relevant theoretical studies and the analysis of practice contained in the reports prepared by the former Special Rapporteur and in the Secretariat's study (A/CN.4/596 and Corr. 1). New developments over the past year, particularly the jurisprudence of the International Court of Justice and of one domestic court, have also been taken into account as appropriate. Worthy of particular note is the 25 July 2012 judgement of the Swiss Federal Criminal Court.[13]

14. Based on these considerations, and with the methodological goal of facilitating a structured and systemic discussion of the topic, this report will address, in order, the following issues:

(a) The scope of the topic and of the draft articles (section III)

(b) The concepts of immunity and jurisdiction (section IV)

(c) The difference between immunity *ratione personae* and immunity *ratione materiae* (section V)

[13] This is the judgement handed down in case No. BB.2011.140 (http://bstger.weblaw.ch/pdf/20120725_BB_2011_140.pdf), which involved the prosecution of a former Minister of Defence of Algeria.

(d) Identification of the basic norms comprising the regime of immunity *ratione personae* (section VI).

15. Thus, the fundamental issues set out in sections 1.1, 2.1. and 2.2 of the thematic groups referred to in paragraph 72 of the preliminary report will be addressed. In addition, there are three issues that should be considered at the outset: a clear delimitation of the scope of the draft articles to be prepared under the topic; the concept of criminal jurisdiction; and the concept of immunity from foreign criminal jurisdiction.

16. Each of the aforementioned issues is covered in draft articles, the nature of which is necessarily different. Thus, the draft articles on scope, the terms "immunity" and "jurisdiction" and the terms "immunity *ratione personae*" and "immunity *ratione materiae*" are introductory and descriptive and should therefore be included in an introductory Part 1 of the draft articles that focuses on establishing their scope and on definitions. On the other hand, the draft articles on the norms governing immunity *ratione personae* are designed to establish the substantive legal regime applicable to this type of immunity and should therefore be included in a separate and specific part of the draft articles.

17. Lastly, it was deemed unnecessary to consider separately, at this time, sections 1.2 (Immunity in the system of values and principles of contemporary international law) and 1.3 (The relationship between immunity, on the one hand, and the responsibility of States and the criminal responsibility of individuals, on the other), contained in the first group of issues set out in the preliminary report. While it is true that these are cross-cutting issues when considering the topic of the immunity of State officials from foreign criminal jurisdiction as a whole, an in-depth study of them will be most relevant in the context of other issues to be taken up in future reports.

18. The same can be said of the omission from this second report of any consideration of section 2.3 (The absolute or restricted nature of immunity and, in particular, the role that international crimes play or should play), contained in the second group of issues set out in the preliminary report. Although these issues concern immunity *ratione materiae*, their consideration is closely related to the general issues associated with exceptions to immunity; therefore, it is considered more useful to address them at a later stage of the work.

III. The scope of the topic and of the draft articles

19. The scope of the topic "Immunity of State officials from foreign criminal jurisdiction" was addressed by the former Special Rapporteur in his preliminary report,[14] in which he identified a number of issues to be considered when establishing that scope, namely, the criminal, the foreign and the national (not international) nature of the jurisdiction from which immunity would be granted. A fourth issue, unrelated to jurisdiction, concerns the person who enjoys immunity, who must be an official of a State other than the one that purports to exercise jurisdiction. Lastly, his report also refers to the special status of diplomatic agents, consular officials, members of special missions and agents or officials of an international organization, although this status is not considered as a criterion for establishing the scope of the topic.

[14] See A/CN.4/601 and, in particular, paras. 103, 104 and 130.

20. On the basis of these issues, the scope of the topic was discussed by both the Commission and the Sixth Committee. It became clear that there was broad support for the aforementioned issues, which, moreover, States commonly face in practice when dealing with the question of the immunity of State officials from foreign criminal jurisdiction. The Special Rapporteur therefore considers that these criteria should be borne in mind when establishing the scope of potential draft articles; this will require proposals that clearly establish their scope.

21. To that end, it would seem advisable to take a dual approach, considering both inclusive and exclusive issues, which can be summarized as follows:

(a) The draft articles deal only with criminal jurisdiction, not immunity from civil or administrative jurisdiction;[15]

(b) The draft articles deal only with immunity from foreign criminal jurisdiction, in other words, jurisdiction exercised by a State other than the State of nationality of the official whose immunity is invoked. Thus, they do not cover immunity granted under the domestic law of the official's own State;

(c) The draft articles deal only with immunity from States' domestic criminal jurisdiction, not immunity before international criminal courts;

(d) The draft articles do not deal with persons who are subject to a more specific immunity regime, such as diplomatic agents, consular officials, members of special missions and agents and officials of international organizations;

(e) The draft articles deal only with the immunity of State officials.

22. The reasons for limiting the topic in this manner have been largely explained in previous reports, but some of the most important reasons given should be briefly recalled in order to reiterate or strengthen the arguments put forward by the previous Special Rapporteur and by other members of the Commission and to add new material that may be of interest.

23. With regard to limitation of the scope of the draft articles to the immunities that arise in the context of criminal jurisdiction, the Special Rapporteur would like to point out that this decision was taken by the Commission itself, primarily because it is with respect to this form of jurisdiction that the most serious problems occur in practice. The specificities of criminal jurisdiction, which gives rise to issues that are unlikely to arise in connection with civil or administrative jurisdiction, must also be taken into account. These include, for example, the impact that the exercise of criminal jurisdiction can have on the freedom of movement of the persons concerned, not only in the event of a conviction entailing a custodial sentence but even at an earlier stage if, for example, the accused person is held in custody or pre-trial detention as a purely precautionary measure. Other interim measures, such as passport confiscation, house arrest and the obligation to appear before a judicial authority at regular intervals, are common in the exercise of criminal jurisdiction. Lastly, a criminal trial has a devastating impact on a person's credibility, integrity and dignity. It should also be recalled that the primary conventions on the immunity

[15] One member of the Commission recently suggested that it would be interesting to consider immunity from civil jurisdiction, and one State reported that its practice was limited to the question of the immunity of State officials from foreign civil jurisdiction; however, such comments and reflections, however interesting, cannot be interpreted as a proposal to expand the scope of the draft articles beyond immunity from criminal jurisdiction.

of State authorities from foreign jurisdiction clearly differentiate between immunity from criminal jurisdiction and immunity from civil and administrative jurisdiction; the two are subject to different rules.[16]

24. In light of the above, the Special Rapporteur still considers it most appropriate to limit the scope of the draft articles to immunity from criminal jurisdiction. This does not mean, however, that the existence of immunity from civil and administrative jurisdiction should be completely ignored. These two types of jurisdiction and criminal jurisdiction have in common the fact that immunity from any of them can be invoked; moreover, in practical terms, there are obviously links between the three forms of jurisdiction. For now, suffice it to note that criminal and administrative penalties are clearly related, as seen in national and international jurisprudence, and, from a broader perspective, that civil compensation suits may be an indirect remedy for serious violations of the law, including criminal offences. Lastly, rulings on immunity in the context of civil jurisdiction, in particular, are common and may be applicable, *mutatis mutandi*, to immunity invoked in the context of criminal jurisdiction.

25. In any event, these arguments do not outweigh the aforementioned reasons for limiting the draft articles to criminal jurisdiction. To include in the draft articles specific provisions relating to civil and/or administrative jurisdiction would introduce a distorting element that could well undermine the final outcome of the Commission's work. However, this does not preclude the Commission from taking State practice concerning immunity from civil or administrative jurisdiction into consideration, to the extent possible and as needed, if it can be used as a basis for conceptual or other arguments supplementing the Commission's work on the topic of immunity from criminal jurisdiction.

26. With regard to limiting the scope of the draft articles to foreign criminal jurisdiction, it suffices, at the outset, to note that immunity granted under domestic law and immunity granted under international law do not necessarily have the same nature, function and purpose, nor are they designed to protect the same values and principles. Therefore, the "foreign" proviso, which ultimately leads to the principle of the sovereign equality of States and the need for the continued maintenance of sustainable and peaceful international relations, is sufficient to justify the Commission's consideration of the topic of immunity from criminal jurisdiction. Furthermore, it should be recalled that granting immunity from foreign criminal jurisdiction to certain State officials or representatives does not automatically imply granting them immunity from domestic jurisdiction; in fact, as noted by the International Court of Justice, the exercise of criminal jurisdiction by the domestic courts of the State of the official is one way of ensuring that the procedural instrument of immunity is not automatically interpreted as an instrument that relieves that person of all substantive criminal responsibility. Consequently, continuing to limit the scope of the draft articles in this manner is fully justified and a study of State practice on immunity would be relevant to the Commission's work only to the extent that such practice involves the immunity of a foreign official or representative.

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[16] See, in particular, the Vienna Convention on Diplomatic Relations, arts. 31 and 37; the Vienna Convention on Consular Relations, art. 43, *a contrario*; and the Convention on Special Missions, art. 31.

27. With regard to the exclusion of immunity before international criminal courts from the scope of the draft articles, the former Special Rapporteur drew attention to the first criterion: the fact that national and international jurisdiction are different in nature. In the Special Rapporteur's opinion, there is also another obvious and equally important reason: immunity before international criminal courts has already been specifically regulated by the international instruments that established and regulated the functioning of the international criminal courts. Therefore, there is no need for the Commission to revert to a matter that has already been sufficiently delimited and clarified, regardless of the differing interpretations that may arise in practice when applying these international legal norms.

28. There is also widespread agreement that immunity before international criminal courts should not be included in the topic. Nevertheless, it should be noted that acceptance of this criterion has been the subject of different views regarding the consequences that it could or should have for the Commission's future work. It should be recalled that some members of the Commission and some States have maintained, either directly or indirectly in their statements in the Sixth Committee, that the exclusion of immunity before international criminal courts would completely exclude the question of international criminal jurisdiction from the Commission's work on the topic.

29. This is, however, a somewhat inconsistent position in terms of methodology. On the contrary, as noted above with regard to civil and administrative jurisdiction, in establishing the scope of the draft articles it is also necessary to make a distinction between, on the one hand, rejecting the proposal to include specific provisions on immunity from international criminal jurisdiction and, on the other, taking interpretations arising from or related to such jurisdiction into account. But this is not the time to enter into a debate on this issue; suffice it to note that it would be surprising if the Commission decided that it could take the actions of other international courts (such as the International Court of Justice and regional human right courts) into account but that it must ignore the very existence of a specifically criminal international court that shares with domestic courts the goal of prosecuting certain particularly serious international crimes.

30. In any event, suffice it to note the need for a clear distinction between direct consideration of international criminal jurisdiction within the framework of this topic (which must not be done) and consideration of such jurisdiction as supplementary, useful and, where appropriate, an aid to interpretation. This cannot and should not result in automatic inclusion in the draft articles of the principles on immunity contained in the instruments that regulate the international criminal courts. However, it should at least allow for study of these courts' own rules and jurisprudence to the extent that they are relevant to or provide clarification of the topic of the immunity of State officials from foreign criminal jurisdiction. This approach does not contradict either the hermeneutic criteria specific to international law or the practice followed by the Commission in considering other topics.

31. With regard to the third of the aforementioned criteria, it seems unnecessary to give a special reason for excluding from the scope of the draft articles the specific regimes governing immunity from criminal jurisdiction on the grounds of the status of the individuals who are deemed to enjoy such immunity or the functions that they perform. Both diplomatic and consular immunities and the immunity of international organizations have been the subject of considerable normative

development (in treaty and customary law). Therefore, it seems unnecessary for the Commission to reconsider, let alone modify, these already well-established and generally accepted regimes. However, this does not preclude it from taking these supplementary regimes into account in its work on the immunity of State officials from foreign criminal jurisdiction, especially as the Commission played a significant role in the establishment of those regimes.

32. Lastly, with regard to subjective limitation of the scope of the draft articles, it should be recalled that the title of the topic refers to "officials" in English, "*représentants*" in French and "*funcionarios*" in Spanish. While it is generally agreed that these terms basically refer to individuals who act in the name and on behalf of the State, it is also true that the terminological differences have given rise to debate on the need to define the term "official" for the purposes of this topic and, in particular, of the draft articles in question. This task is certainly essential, but it should be noted that, in the opinion of the Special Rapporteur, it is particularly important in the context of immunity *ratione materiae* and should therefore be addressed in that connection. Consequently, the term "official" will continue to be used on a provisional basis in this report and in the draft articles contained therein, with the proviso that the latter's wording may be modified once a decision on the aforementioned terminological issue has been taken.

33. On the basis of the above, two draft articles that establish the scope of the draft articles from a dual perspective — both positive and negative — may be formulated. The Special Rapporteur is of the view that that scope should be established at the outset of the work in order to avoid gaps that could hinder it in the future. In addition, these draft articles should be placed in Part 1 of the draft articles so as to provide, together with the definitions, a framework for them.

34. To that end, the following draft articles are proposed:

Draft article 1
Scope of the draft articles

Without prejudice to the provisions of draft article 2, these draft articles deal with the immunity of certain State officials from the exercise of criminal jurisdiction by another State.

Draft article 2
Immunities not included in the scope of the draft articles

The following are not included in the scope of the present draft articles:

(a) Criminal immunities granted in the context of diplomatic or consular relations or during or in connection with a special mission;

(b) Criminal immunities established in headquarters agreements or in treaties that govern diplomatic representation to international organizations or establish the privileges and immunities of international organizations and their officials or agents;

(c) Immunities established under other ad hoc international treaties;

(d) Any other immunities granted unilaterally by a State to the officials of another State, especially while they are in its territory.

IV. The concepts of immunity and jurisdiction

35. Immunity and jurisdiction are the two basic concepts on which consideration of this topic and the draft articles resulting therefrom will be based since their purpose is, in fact, to identify the situations in which a State's courts may not exercise jurisdiction in criminal matters owing to the immunity enjoyed by certain officials of another State. Consequently, although the concepts are separate from one another, as correctly noted by the International Court of Justice in the *Arrest Warrant* case[17] and recalled by Special Rapporteur Kolodkin,[18] only the relationship between them can justify the Commission's consideration of this topic.[19] Therefore, defining the two concepts separately is a precondition for proper handling of the topic and the draft articles. These definitions should, of course, logically be included in Part 1 of the draft articles in order to provide a framework for the rest.

A. The concept of criminal jurisdiction

36. The concept of immunity is, by necessity, based on the prior existence of the criminal jurisdiction of the State, without which the institution of immunity itself would be meaningless.[20] Consequently, irrespective of the procedural handling of immunity, it is first necessary to determine what we mean by "jurisdiction" for the purposes of these draft articles.

37. It may at first appear unnecessary[21] to define "jurisdiction" since it is a generally accepted term that is an uncontested component of all domestic legal systems under which immunity can be invoked. While this may be true, the fact remains that the concept of jurisdiction has been dealt with on many occasions in connection with international law and that the term can have different meanings in different States' legal systems.[22] In any event, it should be borne in mind that

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[17] See the judgment of 14 February 2002 in *Arrest Warrant of 11 April 2000 (Democratic Republic of Congo v. Belgium), Judgment, I.C.J. Reports 2002*, para. 46.

[18] See A/CN.4/601, para. 61.

[19] See A/CN.4/601, para. 43 and note 98. As the former Special Rapporteur recalled, the International Court of Justice stated in the *Arrest Warrant* case that "it is only where a State has jurisdiction under international law in relation to a particular matter that there can be any question of immunities in regard to the exercise of that jurisdiction".

[20] In this connection, see A/CN.4/596, paras. 7 and 14. The close relationship between "jurisdiction" and "immunity" is also addressed in art. I, para. 2, of the Resolution on Immunity from Jurisdiction of the State and of Persons Who Act on Behalf of the State in case of International Crimes, adopted by the Institute of International Law in 2009, which reads: "For the purposes of this Resolution 'jurisdiction' means the criminal, civil and administrative jurisdiction of national courts of one State as it relates to the immunity of another State or its agents conferred by treaties or customary international law".

[21] It should be borne in mind that the definitions of the terms "jurisdiction" and "immunity" were also discussed by the Commission during its consideration of the jurisdictional immunities of States and their property, although the Special Rapporteur's proposals in that connection were rejected by the Commission and were not reflected in the Convention adopted by the General Assembly in 2004.

[22] The former Special Rapporteur addressed the concept of jurisdiction in a broad sense in his preliminary report; his analysis may still be considered useful. See A/CN.4/601, paras. 43 to 47. The concept was also addressed in the memorandum prepared by the Secretariat: see A/CN.4/596, paras. 7 to 13.

references to jurisdiction in this report are always made in the context of immunity from criminal jurisdiction; this introduces a distinction that should be duly taken into account.[23] Thus, while this report does not purport to enter into a theoretical analysis of the matter, it is necessary first to establish that conceptual distinction in order to show that the term "jurisdiction" cannot refer to civil jurisdiction in the context of the topic under consideration, owing not only to the conceptual distinction noted above, but also to the fact that identification of the types of acts that fall into the general category of "jurisdiction" is an important matter that should be taken up by the Commission in due course, particularly when it addresses the issue of immunity from foreign criminal jurisdiction from a procedural standpoint. Consider, for example, the potential impact that the adoption of an executive act, such as the detention of an individual, the confiscation of travel documents or the incorporation into an international system of police cooperation and assistance of a warrant for the arrest and capture of an accused person, prior to or independently of the work of the judiciary, could have on immunity from foreign criminal jurisdiction. Thus, for the purposes of this exercise, it is particularly important to define the term "criminal jurisdiction".

38. However, the intention at this stage of the work is not to compile a detailed list of all the types of acts covered by the term "jurisdiction", but rather to provide a definition of the term that is broad enough for it to be effectively compared with the various factors that establish immunity and with the various acts — judicial and executive — in respect of which immunity can be invoked. The Special Rapporteur is of the view that, in the context of the immunity of State officials from foreign jurisdiction, this comparison should be based on the premise that the State already has criminal jurisdiction and is therefore competent to perform a set of judicial and, in some cases, executive acts, the sole purpose of which is to determine whether, or establish that, there is specific individual criminal responsibility for acts that constitute crimes or misdemeanours under the domestic law of the State in question.

39. Thus, the very concept of jurisdiction is closely related to the determination of criminal jurisdiction and should be included therein. In this connection, it should also be borne in mind that the concept of jurisdiction and the legislation on which it is based are not identical in every State; they have their source not only in the norms and principles of international law but in the State's own legislation, which is adopted on the basis of those international norms and principles and grants jurisdiction to its own courts. In this regard, the Special Rapporteur considers that it is not the purpose of this report to analyse such legal bases for jurisdiction and jurisdictional links or to debate the question of whether and to what extent the granting of such jurisdiction is fully consistent with international law; whether the international norms on which States rely in granting domestic jurisdiction to national courts are norms that impose obligations, or whether they merely enable or authorize the granting of such jurisdiction; and what the implications of this distinction might be in practice. Such a debate falls outside the agreed mandate of the Commission for the consideration of this topic and could have a greater impact on other issues that are included in the Commission's long-term (extraterritorial jurisdiction) or current (the obligation to extradite or prosecute (*aut dedere aut judicare*)) programme of work or that could be included in its programme of work should the General Assembly so decide (international jurisdiction).

[23] See A/CN.4/601, paras. 48 to 55.

40. At a minimum, however, attention must be drawn to the variety of bases for jurisdiction upon which States have built their systems of domestic criminal jurisdiction since the issue of immunity will ultimately arise under domestic jurisdiction (in other words, the criminal jurisdiction of a specific State). For now, suffice it to note that such a system may be based on territorial jurisdiction, personality (active or passive), the protection principle or universal jurisdiction. All of these systems are potential sources of States' competence to exercise criminal jurisdiction *stricto sensu* and, with the exception of active personality, any of them may give rise to the exercise of criminal jurisdiction in respect of an alien who might be categorized as an official and could therefore invoke immunity. The use of one or another of these systems is contingent on the will of the State concerned and, in practice, results in a multiplicity of national jurisdictional models that the Commission should not fail to take into account, especially as many of the cases that arise in practice rely heavily on the use of a system of jurisdiction that is based on some form of extraterritorial jurisdiction.[24] However, they should be taken into consideration for the sole purpose of establishing jurisdiction as a precondition for immunity. The Special Rapporteur is therefore of the view that when defining the term "jurisdiction" for the purposes of this topic and these draft articles, the nature of each of the legal systems on which a State that purports to exercise jurisdiction may rely is irrelevant. To summarize, the existence of a multiplicity of jurisdictional systems, and thus of a multiplicity of jurisdictional models in States' criminal legislation, is a de facto precondition that the Commission should take into account in its work; however, this does not imply any assessment of or pronouncement on any of these jurisdictional systems.

41. Moreover, it should be noted that the term "criminal jurisdiction" refers primarily to a State's competence to exercise its power to prosecute crimes and misdemeanours that are established as such in the applicable provisions of its legislation. This purposive element should therefore be reflected in the definition of "criminal jurisdiction". In any event, care should be taken to ensure that the legal nature of immunity, which is purely procedural, is not affected in any way. Thus, the inclusion in the definition of "criminal jurisdiction" of a reference to the establishment of individual criminal responsibility does not and cannot result in a foreign official who enjoys such immunity being relieved of such responsibility; this issue will be addressed in the future.[25]

42. In light of the foregoing considerations, the Special Rapporteur considers it useful to include in the draft articles a definition of "foreign criminal jurisdiction" as part of an introductory draft article on "definitions". To that end, the following draft article is proposed:

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[24] In this regard, suffice it to note the recent judgement of the Swiss Federal Criminal Court (Appeals Chamber) of 25 July 2012 (case No. BB.2011.140), in which the Court, in the exercise of universal jurisdiction, ruled on the immunity from foreign criminal jurisdiction of a former Minister of Defence of Algeria.

[25] The jurisprudence of the International Court of Justice on this matter has been reiterated and consistent. See the judgment of 14 February 2002 in *Arrest Warrant of 11 April 2000 (Democratic Republic of Congo v. Belgium), Judgment, I.C.J. Reports 2002*, para. 60; *Certain questions of Mutual Assistance in Criminal Matters (Djibouti v. France), Judgment, I.C.J. Reports 2008*, para. 196; and the judgment of 3 February 2012 in *Jurisdictional immunities of the State: Germany v. Italy: Greece intervening*, paras. 58 and 100.

Draft article 3
Definitions

For the purposes of the present draft articles:

(a) The term "criminal jurisdiction" means all of the forms of jurisdiction, processes, procedures and acts which, under the law of the State that purports to exercise jurisdiction, are needed in order for a court to establish and enforce individual criminal responsibility arising from the commission of an act established as a crime or misdemeanour under the applicable law of that State. For the purposes of the definition of the term "criminal jurisdiction", the basis of the State's competence to exercise jurisdiction is irrelevant;

B. The concept of immunity from foreign criminal jurisdiction

43. Like the term "jurisdiction", the term "immunity" is not usually defined in the international instruments that, in one way or another, have dealt with the immunities of the State and its officials or agents, including the United Nations Convention on Jurisdictional Immunities of States and Their Property, the Vienna Convention on Diplomatic Relations and the Convention on Special Missions. In particular, with regard to "immunity from criminal jurisdiction", normative practice has, in the past, tended simply to mention "immunity from criminal jurisdiction" as one component of the regime of privileges and immunities set out in each of those instruments without defining it. This presents us with a nebulous legal concept, the scope of which must be determined through an analysis of practice and, in particular, State practice.

44. Notwithstanding the aforementioned practice, the task of integrating this nebulous legal concept is not particularly difficult since the concept of immunity from jurisdiction was the subject of lengthy discussion, including within the Commission, during the *travaux préparatoires* of the aforementioned instruments. In addition, the concept — that is, criminal jurisdiction in the context of the topic under consideration — was studied in detail by the Secretariat in its memorandum[26] and by the former Special Rapporteur in his preliminary report.[27]

45. A set of characteristics of the concept of "immunity from foreign criminal jurisdiction" has emerged from all this previous work and can be summarized as follows:

(a) Immunity prevents a State from exercising its criminal jurisdiction even though its courts would, in principle, be competent to prosecute a given misdemeanour or crime;

(b) Immunity arises only as a result of the existence of a foreign component, referred to generically as an "official" of another State;

(c) Immunity from foreign criminal jurisdiction is, by nature, eminently procedural and has no affect on the substantive criminal law of the State that has jurisdiction or on the individual criminal responsibility of the person who enjoys immunity.[28]

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[26] See A/CN.4/596, paras. 14 to 66.
[27] See A/CN.4/601, paras. 56 to 70.
[28] See above, note 24.

46. In light of the above, a definition of "immunity from foreign criminal jurisdiction" that incorporates these general characteristics can be formulated. The following wording is suggested:

Draft article 3
Definitions

For the purposes of the present draft articles:

(b) "Immunity from foreign criminal jurisdiction" means the protection from the exercise of criminal jurisdiction by the judges and courts of another State that is enjoyed by certain State officials;

V. The distinction between immunity *ratione personae* and immunity *ratione materiae*

47. The distinction between immunity *rationae personae* and immunity *rationae materiae* has been discussed and generally accepted in doctrine, either in those words or as "personal immunity" and "functional immunity". As both types of immunity have also been adequately addressed in the preliminary report of the former Special Rapporteur[29] and in the memorandum by the Secretariat,[30] there is no need to revert to the issues discussed in those documents at this time. It should also be noted that the distinction between immunity *ratione personae* and immunity *ratione materiae* is one of the few matters on which there has been broad consensus during the Commission's discussions on this topic.

48. The two types of immunity have both significant elements in common and elements that clearly differentiate them from one another. The former include their basis and purpose, which is simply to ensure respect for the principle of the sovereign equality of States, prevent interference in their internal affairs and facilitate the maintenance of stable international relations by ensuring that the officials and representatives of States can carry out their functions without external difficulties or impediments.[31] This means that consideration of immunity from criminal jurisdiction must necessarily take a functional point of view or approach since the protection afforded to persons who enjoy immunity is ultimately granted to them by virtue of the functions or tasks that each of them performs within his or her hierarchical official relationship with the State. These tasks are necessarily different depending on the status of the various categories of protected persons; this will result in different manifestations of the functional nature of immunity and, consequently, in the establishment of a different legal regime for each of the

[29] See A/CN.4/601, paras. 78-83.

[30] See A/CN.4/596, para. 88 et seq.

[31] In this regard, the Institute of International Law, in its 2009 resolution on the Immunity from Jurisdiction of the State and of Persons Who Act on Behalf of the State in case of International Crimes (art. II, para. 1), states that "immunities are conferred to ensure an orderly allocation and exercise of jurisdiction in accordance with international law in proceedings concerning States, to respect the sovereign equality of States and to permit the effective performance of the functions of persons who act on behalf of States". The International Court of Justice stressed this functional and purposive nature of immunity in its decision of 14 February 2002 in *Arrest Warrant of 11 April 2000 (Democratic Republic of Congo v. Belgium), Judgment, I.C.J. Reports 2002*, para. 53).

aforementioned types of immunity from foreign criminal jurisdiction. Since this "functional" component is common to both types, for the purposes of this report and of the draft articles it is considered preferable to refer to them as "immunity *ratione personae*" and "immunity *ratione materiae*" in order to avoid terminological confusion that could have an unwanted conceptual effect.

49. In addition, both immunity *ratione personae* and immunity *ratione materiae* protect and are granted to individuals even though the ultimate purpose of granting them is to protect the rights and interests of the State. Therefore, whatever position the State takes with regard to these forms of immunity should be examined, particularly in the context of invocation or waiver of immunity. Thus, it must be borne in mind that immunity from foreign criminal jurisdiction precludes the exercise of criminal jurisdiction; it applies to specific categories of persons who, if they did not enjoy immunity, might be subject to criminal proceedings in order to establish whether they had individual criminal responsibility. Consequently, while this is not the time to address the matter in depth, it should be noted that immunity from foreign criminal jurisdiction (both *ratione personae* and *ratione materiae*) must be distinguished from the immunity of the State, with which it must not be confused even though they have points in common.[32]

50. However, in addition to the common elements outlined above, there are also significant differences between immunity *ratione personae* and immunity *ratione materiae* that should be noted. It can be concluded from practice that immunity *ratione personae* has the following characteristics:

(a) It is granted only to certain State officials who play a prominent role in that State and who, by virtue of their functions, represent it in international relations automatically under the rules of international law;

(b) It applies to all acts, whether private or official, that are performed by the representatives of a State;

(c) It is clearly temporary in nature and is limited to the term of office of the person who enjoys immunity.[33]

Immunity *ratione materiae*, for its part, has the following characteristics:

(a) It is granted to all State officials;

(b) It is granted only in respect of acts that can be characterized as "official acts" or "acts performed in the exercise of official functions";

(c) It is not time-limited since immunity *ratione materiae* continues even after the person who enjoys such immunity has left office.

51. Although the distinction between immunity *ratione personae* and immunity *ratione materiae* is widely accepted in doctrine and reflected in judicial practice, it is noteworthy that it is not similarly reflected in national legislation. Of the States that replied to the first of the questions posed by the Commission at its previous session, the majority indicated that their domestic law did not contain any specific

[32] The International Court of Justice referred to the distinction between the immunity of the State and the immunity of State officials from foreign criminal jurisdiction explicitly, in para. 87 of its judgment of 3 February 2012 in *Jurisdictional immunities of the State: Germany v. Italy: Greece intervening*, and implicitly, in para. 91 of the same case.

[33] Concerning these characteristics, see section VI of this report.

provisions establishing such a distinction. However, some of them provided examples showing that the distinction was made indirectly in their domestic law or, more frequently, in their jurisprudence. In reality, this response is not entirely unexpected as it relates to two elements of practice that cannot be ignored: (a) State practice concerning immunity from foreign criminal jurisdiction is not very extensive; and (b) With the exception of generic references to the applicability of international law, domestic law does not typically include immunity provisions with a foreign component.

52. Nevertheless, for the purposes of this topic and the draft articles that may result from it, it is useful and necessary to make a clear distinction between immunity from foreign criminal jurisdiction *ratione personae* and *ratione materiae*, not only for analytical or descriptive reasons but, above all, because the normative elements of each of these types of immunity must be determined in order to establish the legal regime applicable to it, including the procedural approaches that must be followed in order to give effect to the immunity of State officials from foreign criminal jurisdiction. Furthermore, this distinction is not unrelated to the general issue of the applicable exceptions to immunity from such jurisdiction, which is undoubtedly one of the issues on which there is the greatest degree of uncertainty and disagreement.

53. In light of these observations, it is considered necessary to define the two types of immunity in general terms as a frame of reference for their further consideration. These definitions, for which the following wording is suggested, should be included in draft article 3 on "definitions":

Draft article 3
Definitions

For the purposes of the present draft articles:

(c) "Immunity *ratione personae*" means the immunity from foreign criminal jurisdiction that is enjoyed by certain State officials by virtue of their status in their State of nationality, which directly and automatically assigns them the function of representing the State in its international relations;

(d) "Immunity *ratione materiae*" means the immunity from foreign criminal jurisdiction that is enjoyed by State officials on the basis of the acts which they perform in the discharge of their mandate and which can be described as "official acts".

VI. Immunity *ratione personae*: normative elements

54. In this report, the term "normative elements" refers to the aspects of immunity *ratione personae* that are relevant in establishing the legal regime applicable to this type of immunity from foreign criminal jurisdiction. On the basis of the definition of immunity *ratione personae* provided in section V above and contained in draft article 3 (c), these normative elements can be identified as follows:

(a) The subjective scope of immunity *ratione personae*: who enjoys immunity?

(b) The material scope of immunity *ratione personae*: what types of acts performed by these individuals are covered by immunity?

(c) The temporal scope of immunity *ratione personae*: over what period of time can immunity be invoked and enjoyed?

Each of these elements will be considered separately below.

55. Issues surrounding potential exceptions to immunity ratione personae and procedural aspects of such immunity are not dealt with in this section as they will be examined at a later stage.

A. The subjective scope of immunity *ratione personae*

56. Identification of the persons who enjoy immunity is clearly a prerequisite for its exercise and is particularly important in the case of immunity from criminal jurisdiction, where, apart from other considerations, the question is whether, in a given case, the State has jurisdiction to conclude that criminal responsibility lies with the individual, not the State. In the case at hand, the identification of these persons is also of interest since the title of the topic, as chosen by the Commission, refers generically to State "officials" ("*funcionarios*" in Spanish and "*représentants*" in French), which has caused concern regarding the definition of the term "official".

57. This concern is relevant to the consideration of immunity *ratione personae*, which, as noted above, necessarily refers to a small number of people who perform State functions or hold State office at the highest level, by virtue of which they are authorized to represent the State at the international level.[34] Therefore, the definition of "official" may not be relevant to this type of immunity if it is decided to follow a strict interpretation that links and restricts immunity *ratione personae* to Heads of State, Heads of Government and ministers for foreign affairs. On the other hand, that definition could take on greater importance if it is decided to follow a broader interpretation whereby immunity might also be enjoyed by other senior State officials, including, as often suggested, other members of the Government such as ministers of defence, ministers of trade and other ministers whose office requires them to play some role in international relations, either generally or in specific international forums, and who must therefore travel outside the borders of their own country in order to perform their functions. In this case, it would be necessary to define "official" for the purposes of immunity *ratione personae*, although it should be noted that this definition would need to be specific and clearly differentiated from the generic definition of "official" to be used in the context of immunity *ratione materiae* since the legal regimes applicable to the two categories of officials would also necessarily be different.

58. First, following the stricter interpretation, it is evident that, generally speaking, the granting of immunity *ratione personae* to Heads of State, Heads of Government and ministers for foreign affairs is established practice. Thus, while it is true that the granting of such immunity was originally limited to Heads of State and subsequently

[34] See A/CN.4/601, paras. 109 to 121 and A/CN.4/596, paras. 96 to 136.

extended to Heads of Government,[35] its extension to ministers for foreign affairs is not in doubt in light of the judgment of the International Court of Justice in the *Arrest Warrant* case: "(...) in international law it is firmly established that, as also diplomatic and consular agents, certain holders of high-ranking office in a State, such as the Head of State, Head of Government and Minister for Foreign Affairs, enjoy immunities from jurisdiction in other States, both civil and criminal".[36] Thus, while it is true that there has been some disagreement in the Commission and the Sixth Committee with regard to the granting of immunity to ministers for foreign affairs,[37] it should be recalled that this opposing view regarding such ministers is unusual and, moreover, difficult to reconcile with the judgment of the Court, which can be assumed to reflect the applicable customary law at the time of its issuance.

59. The basis for the view that immunity is enjoyed by Heads of State, Heads of Government and ministers for foreign affairs is the fact that their functions include representing the State in international relations, a function that, it should be borne in mind, is based on international law and performed automatically, without the need for any express authorization by the State that they represent.[38] In essence, their function is to represent the State under its political and administrative model and its domestic law, which, in their respective States, sets the requirements for the post of Head of State, Head of Government or Minister for Foreign Affairs. It is a representational function which international law attributes to these offices, independently of a State's domestic law, the sole function of which is to establish a homogeneous hierarchical model for representation of the State within the international community as a whole, and which promotes and facilitates the

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[35] In this connection, the origin of this type of immunity, which is linked to the person of the sovereign, should be borne in mind. While this interpretation has been superseded, it is true that various international instruments adopted in the fairly recent past refer exclusively to the Head of State in establishing special personal immunity rules; see, for example, art. 3, para. 2, of the United Nations Convention on Jurisdictional Immunities of States and Their Property. On the other hand, the Convention on Special Missions separates the immunities of the Head of State (art. 21, para. 1) from those of "the Head of the Government, the Minister for Foreign Affairs and other persons of high rank, when they take part in a special mission (...)" (art. 21, para. 2). In the context of private codification, it should be noted that the International Law Institute, in its 2001 Vancouver resolution, focuses first on the Head of State and then extends the immunity and inviolability regime to the Head of Government but does not grant the same status to the Minister for Foreign Affairs.

[36] See the judgment of 14 February 2002 in *Arrest Warrant of 11 April 2000 (Democratic Republic of Congo v. Belgium), Judgment, I.C.J. Reports 2002*, para. 51.

[37] The case against granting immunity *ratione personae* to ministers for foreign affairs has been made repeatedly by South Africa.

[38] The following statement by the International Court of Justice in the *Arrest Warrant* case is particularly enlightening; although it refers to the Minister for Foreign Affairs, its basic elements can easily be applied to the Head of State and the Head of Government: "He or she is in charge of his or her Government's diplomatic activities and generally acts as its representative in international negotiations and intergovernmental meetings. (...) His or her acts may bind the State represented (...) The Court further observes that a Minister for Foreign Affairs, responsible for the conduct of his or her State's relations with all other States, occupies a position such that, like the Head of State or the Head of Government, he or she is a zed under international law as representative of the State solely by virtue of his or her office. He or she does not have to present letters of credence: to the contrary, it is generally the Minister who determines the authority to be conferred upon diplomatic agents and countersigns their letters of credence" (judgment of 14 February 2002 in *Arrest Warrant of 11 April 2000 (Democratic Republic of Congo v. Belgium), Judgment, I.C.J. Reports 2002*, para. 53).

maintenance of international relations.[39] It is precisely this automatic representational nature, based on international law, which explains the status that is granted to these three State officials within the framework of international law as a whole (for example, in treaty law and the law of international responsibility) and which is also recognized in the context of immunity from foreign criminal jurisdiction, whereby the regime that applies to such officials (immunity *ratione personae*) differs from the regime that applies to other State officials.

60. From this perspective, once it is acknowledged that the basis of this special regime is the very special representational status of Heads of State, Heads of Government and ministers for foreign affairs, which is specifically based on and recognized by international law, it is undeniable that this is an extraordinary situation that cannot be extrapolated to include other people, including members of Government, regardless of whether they hold senior posts in their States of nationality.[40] It is, of course, possible to identify norms of international law, similar to those applied to members of the *troika*, which confer on them a representative function comparable to that of Heads of State, Heads of Government and ministers for foreign affairs, but in the absence of such norms, immunity *ratione personae* cannot be granted to any State official other than Heads of State, Heads of Government and ministers for foreign affairs even though other senior officials may also play a role in international relations.[41]

61. In contrast to this first approach, a broader interpretation of immunity *ratione personae* would allow certain other senior State officials, in addition to the *troika* — primarily those who, as a result of their functions under the domestic law that governs their activities, must play a role in international affairs and who travel abroad frequently and even represent the State, albeit in a specific area — to be included in the scope of subjective application of such immunity. Thus, granting these individuals the immunity *ratione personae* that is already enjoyed by Heads of State, Heads of Government and ministers for foreign affairs, whose functions are comparable to theirs, would help to strengthen the secure and sustainable nature of international relations and the sovereign equality of States in light of new models of

[39] The regime of diplomatic and consular relations was established on a similar basis, as was the regime applicable to special missions; both also introduced rules governing immunity from foreign criminal jurisdiction that can be characterized as immunity *ratione personae*.

[40] In this regard, it should also be recalled that various international instruments and laws distinguish between the Head of State, the Head of Government and the Minister for Foreign Affairs, on the one hand, and other senior State officials, including at the ministerial level, on the other; see, in particular, art. 21 of the aforementioned Convention on Special Missions. Similarly, although from a different perspective, the definition of "protected persons" in the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, makes a clear distinction between the Head of State, the Head of Government and the Minister for Foreign Affairs, on the one hand (art. 1, para. 1 (a)), and "any representative or official of a State", on the other (art. 1, para. 1 (b)). Furthermore, the International Law Institute, in its 2001 resolution, makes a clear distinction between the immunities of the Head of State and Head of Government and the "immunities to which other members of the government may be entitled on account of their official functions" (art. 15, para. 2).

[41] In the Sixth Committee during the most recent session of the General Assembly, the following States indicated that they were in favour of restricting immunity *ratione personae* to the *troika*: Austria, Belgium, the Congo, Greece, Ireland, Jamaica, Malaysia, the Netherlands, New Zealand, Portugal, Slovenia, Spain and the United States of America.

diplomacy and international relations.[42] Advocates of this broader interpretation have sought to justify it by a literal reading of the wording of the judgment of the International Court of Justice in the aforementioned *Arrest Warrant* case, especially the use of the expression "such as", which makes that wording non-restrictive. In addition, there are examples of State judicial practice in which certain domestic courts have granted immunity *ratione personae* to senior State officials other than the *troika*. This should therefore be taken into consideration.

62. With regard to "broader tendency" described above, it should be noted, first, that the interpretation of the aforementioned wording of the Court's judgment should be read in context. Thus, despite its literal meaning, it is difficult to conclude that the Court was referring to the existence of an open-ended list of persons who enjoy immunity *ratione personae*. On the contrary, when the Court has had an opportunity to expand the list of people protected by such immunity, as in *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France)*, it has not done so, limiting its pronouncements in that regard to the Head of State. With respect to the Public Prosecutor and the Chief of National Security, it is clear that the Court has made no explicit pronouncement as to whether they enjoy general immunity *ratione personae*, although it has concluded that these senior officials do not enjoy personal immunity because they are not diplomatic agents and are not covered by the Convention on Special Missions.[43]

63. Second, State practice on this matter is not widespread, nor is it coherent or consistent with regard to the remedies provided in a particular case and the arguments advanced by different national courts. In light of the pronouncements that support the expansion of immunity *ratione personae*, consideration should be given to other cases where the reverse was true[44] or where, while there was no ruling on the type of immunity that was invoked or granted, there was a clear difference between the treatment accorded to a member of the *troika* and that accorded to other senior State officials. Consequently, given the lack of consistent State practice, it is impossible to find arguments in favour of extending immunity *ratione personae* to include senior State officials other than the *troika* as this would amount to giving them the direct, automatic function of representing the State in international relations on the basis of a rule of international law that cannot be shown to exist.[45]

64. Lastly, attention should be drawn to the fact that, even among those who support the expansion of immunity *ratione personae* to include officials other than the *troika*, there is general agreement on the impossibility of drawing up an exhaustive list of these officials since very different opinions regarding the nature

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[42] In this connection, the following States have indicated, to varying degrees, their willingness to explore a non-restrictive interpretation: Algeria, Belarus, Chile, China, France, Israel, Norway, Peru, Portugal, the Russian Federation, Switzerland, the United Kingdom of Great Britain and Northern Ireland and Viet Nam.

[43] *Certain questions of Mutual Assistance in Criminal Matters (Djibouti v. France), Judgment, I.C.J. Reports 2008*, para. 194. However, it must be borne in mind that in this judgment, the International Court of Justice seems, if only partially, to equate the immunity of these senior officials with that of the State (see paras. 187, 188 and 196).

[44] In this connection, see the recent Swiss Federal Criminal Court judgement of 25 July 2012, cited above.

[45] Several States (Malaysia, Norway and Slovenia) have urged caution in any broad interpretation since there is a significant difference in the level at which the two categories of senior officials represent the State.

and range of the senior officials who should enjoy this type of immunity have been expressed.[46] There is, however, a consistent tendency for proponents of the broader interpretation to suggest a more suitable method of identifying the criteria that would justify granting immunity *ratione personae* to these "other senior State officials".[47]

65. It is true that in practice, it is not unusual to find examples of the granting of general immunity *ratione personae* under international law to State officials other than Heads of State, Heads of Government and ministers for foreign affairs. Undoubtedly, the most important example is the immunity of diplomatic agents from criminal jurisdiction, which could be supplemented by cases involving the granting of immunity *ratione personae* under the rules applicable to special missions, and even some cases in which, under unilateral agreements, the same protection has been granted to certain senior officials on official visit to a specific country. These are, however, special regimes that fall outside the scope of this topic and should therefore also be excluded from the scope of the draft articles that the Commission may eventually adopt. It is precisely within the framework of these special regimes, and particularly under a broad interpretation of the special missions regime, that concerns regarding the immunity of a group of senior State officials, who are required to travel outside their countries more or less permanently and more or less often and might therefore be subject to foreign criminal jurisdiction that would clearly hinder the performance of their functions and violate the principle of the sovereign equality of the States on whose behalf they perform these functions, can be addressed.

66. Lastly, it should be noted that granting a form of immunity *ratione personae* that equates other senior State officials, including Government officials, to the *troika* could prevent the competent courts of other States from exercising their jurisdiction, thereby depriving those States of a power that is an aspect of their sovereignty. Only pursuant to a rule of customary international law that so provided could these characteristics have effect. Such a rule has become established for members of the *troika*, but its applicability to other senior State officials cannot be demonstrated at the present stage in the development of international law.

67. In light of the above, the Special Rapporteur considers that the subjective scope of immunity from foreign criminal jurisdiction *ratione personae* should be limited to Heads of State, Heads of Government and ministers for foreign affairs. She therefore proposes the following draft article:

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[46] Some States are of the opinion that immunity *ratione personae* should be granted to ministers of defence and trade (Norway and Switzerland), to ministers responsible for the financial system, in light of the current international situation (Norway) or to deputy prime ministers, all Government ministers and parliamentary leaders (China, Ireland and the United Kingdom).

[47] The need to establish these criteria has been stressed by, in particular, Chile, China, France, Ireland, India, Israel, Japan, Portugal, the Republic of Korea and the Russian Federation. Some States have especially emphasized that the primary criteria should be the rank, involvement in cooperation and international relations and need to travel of the person concerned (see, in particular, the statement made by the United Kingdom).

Draft article 4
The subjective scope of immunity *ratione personae*

Heads of State, Heads of Government and ministers for foreign affairs enjoy immunity from the exercise of criminal jurisdiction by States of which they are not nationals.

68. However, it is true that, in practice, a few examples of the granting of immunity *ratione personae* on a one-time basis to senior officials other than the *troika* can be found. In addition, some members of the Commission and some States have spoken in favour of considering the expansion of this type of immunity to include senior State officials. The Special Rapporteur would like to point out that if the Commission considers it appropriate to discuss the process of expanding immunity *ratione personae*, this process would, in her opinion, constitute progressive development. In any event, the correct approach to such an expansion would require that this type of immunity be addressed independently of and separately from the immunity of Heads of State, Heads of Government and ministers for foreign affairs, particularly in order to ensure that the factors that distinguish such immunity from the immunity *ratione personae* traditionally granted to members of the *troika* are taken into account. In this process, particular consideration should be given to the new territorial element that characterizes this specific type of immunity *ratione personae* owing to the inclusion of the concept of the "official visit", which should be central to this discussion and about which some States have recently expressed particular concern.[48]

B. The material scope of immunity *ratione personae*

69. The second normative element that characterizes immunity *ratione personae* is the type of acts that are covered by such immunity. In that regard, it should be noted that, unlike the subjective scope of immunity *ratione personae*, abstract discussion of its material scope has caused no difficulty in practice. Thus, there has been no objection to the expansion of such immunity to include all acts, whether private or official, that are performed by Heads of State, Heads of Government and ministers for foreign affairs. This is largely explained by the aforementioned special basis of this type of immunity from foreign criminal jurisdiction.

70. This solution is consistent with the provisions of various international instruments that establish specific regimes and provide for a type of immunity that corresponds to immunity *ratione personae*, such as the Vienna Convention on Diplomatic Relations and the Convention on Special Missions.[49] Since protection

[48] In the Sixth Committee, during the most recent session of the General Assembly, Switzerland maintained that the question of whether a State official was on an official visit to the territory of another State was a methodological criterion that should be borne in mind when considering immunity *ratione personae*. The importance of taking official visits by State representatives into account was also raised by Norway, speaking on behalf of the Nordic countries.

[49] See art. 31 and, *a contrario*, art. 39, para. 2, of the Vienna Convention on Diplomatic Relations; see also art. 31 and, *a contrario*, art. 43, para. 2, of the Convention on Special Missions. In both cases, it should be noted that immunity from criminal jurisdiction and immunity from civil and administrative jurisdiction are accorded different treatment since the latter is directly linked to the performance of private acts. Similarly, by establishing the point at which immunity ends, these Conventions make a distinction between official acts and other acts; this is an implicit acknowledgement that unofficial (private) acts are protected by immunity during the period when immunity *ratione personae* is enjoyed by a diplomatic agent or member of a special mission.

from the exercise of foreign criminal jurisdiction under these Conventions follows the same logic as the immunity granted to Heads of State, Heads of Government and ministers for foreign affairs, it follows that its material scope should also be identical. On the other hand, the various attempts at private codification, particularly by the International Law Institute, also include both private and official acts under the umbrella of immunity *ratione materiae*.[50]

71. It should be borne in mind that this approach is reflected in international jurisprudence, which refers to this type of immunity as "full", "total", "complete", "integral" or "absolute" immunity precisely in order to show that it applies to any act performed by a person who enjoys immunity. The practice of domestic courts has traditionally been along similar lines.[51]

72. Consequently, it can be concluded that, to use the term employed by the International Court of Justice, immunity from foreign criminal jurisdiction *ratione personae* is full immunity. Therefore, there is no need to consider in depth which types of acts constitute "private acts" or "official acts" or to ask, as a matter of principle, when or under which circumstances such acts were performed or where the persons who enjoy immunity *ratione persona* were when the acts covered by such immunity were performed or when an attempt was made to exercise jurisdiction over them.[52] The "fullness" of immunity *ratione personae* means that it is enjoyed in respect of any act performed by a Head of State, Head of Government or minister for foreign affairs, regardless of the nature of the act, the place where it was performed and the nature of the foreign travel (official or private) during which a specific State sought to exercise foreign criminal jurisdiction. In any event, from this point of view and in the opinion of the Special Rapporteur, the term "full immunity" is preferable to "absolute immunity", which could have other meanings in light of developments in immunity in the context of international law in recent decades.

73. However, it should be noted that this qualification of immunity *ratione personae* as "full" does not imply any pronouncement on potential exceptions thereto. Any such exceptions would, by their very nature, imply a departure from the general rule, which is "full" immunity. In any event, the question of possible exceptions to immunity is not the subject of this report and should therefore not be reflected in the draft articles proposed below. As noted above in section II of this report, it will be considered at a later time.

74. In light of the above, the following draft article on the material scope of immunity *ratione personae* is proposed:

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[50] See, in particular, the resolution on *Immunities from Jurisdiction and Execution of Heads of State and of Government in International Law*, adopted by the International Law Institute in Vancouver at its 2001 session. Art. 2 is particularly noteworthy and, for the purposes of this topic, should be read in conjunction with art. 3 and art. 13, para. 2.

[51] In this regard, see the interesting analysis contained in the memorandum prepared by the Secretariat (A/CN.4/596, paras. 137 to 140). The recent judgement of the Swiss Federal Criminal Court, referred to repeatedly in this report, also endorses the commonly accepted doctrine that immunity covers all acts performed, in this case, by a Head of State (para. 5.3.1).

[52] See the judgment of 14 February 2002 in *Arrest Warrant of 11 April 2000 (Democratic Republic of Congo v. Belgium), Judgment, I.C.J. Reports 2002*, para. 55.

Draft article 5
The material scope of immunity *ratione personae*

1. The immunity from foreign criminal jurisdiction that is enjoyed by Heads of State, Heads of Government and ministers for foreign affairs covers all acts, whether private or official, that are performed by such persons prior to or during their term of office.

2. Heads of State, Heads of Government and ministers for foreign affairs do not enjoy immunity *ratione personae* in respect of acts, whether private or official, that they perform after they have left office. This is understood to be without prejudice to other forms of immunity that such persons may enjoy in respect of official acts that they perform in a different capacity after they have left office.

C. The temporal scope of immunity *ratione personae*

75. Like the material aspects of immunity *ratione personae*, the temporal scope of this type of immunity is not controversial. On the contrary, there is broad consensus regarding the assertion that immunity from criminal jurisdiction ratione personae applies only while the Head of State, Head of Government or Minister for Foreign Affairs holds office. Thus, immunity *ratione personae* begins when the person who enjoys it takes office and ends when that person leaves office.[53] In other words, immunity *ratione personae* is unequivocally temporary in nature and is contingent on the term of office of the person who enjoys such immunity.[54]

76. This characteristic of immunity *rationae personae* has been consistently reflected in State practice and in international and national jurisprudence. However, it is also true that occasional terminological ambiguity and/or confusion may have an impact on the legal nature of this type of immunity. Thus, it has been reported that in some cases, there is a certain "residual immunity"[55] in respect of official acts performed by Heads of State, Heads of Government and ministers for foreign affairs after they have left office. Or, to put it differently, it is sometimes maintained that immunity *ratione personae* extends beyond the term of office of the individuals who enjoy such immunity in respect of official acts performed by them while in office. The intended purpose of these positions is clear: to preserve some form of immunity from foreign criminal jurisdiction in respect of official acts after these individuals have left office. However, the nature of the immunity applicable to the aforementioned official acts should be clarified and specified as this may, in some cases, have an impact on the legal regime applicable to such immunity.

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[53] See A/CN.4/601, para. 79 and A/CN.4/596, para. 90.

[54] This was expressly stated by the International Court of Justice in its judgment of 14 February 2002 in *Arrest Warrant of 11 April 2000 (Democratic Republic of Congo v. Belgium), Judgment, I.C.J. Reports 2002*, para. 54; see also para. 61 of the same judgment. The same temporal aspect of immunity *ratione personae* was noted by the International Law Institute in its 2009 *Resolution on the Immunity from Jurisdiction of the State and of Persons Who Act on Behalf of the State in case of International Crimes*: "When the position or mission of any person enjoying personal immunity has come to an end, such personal immunity ceases" (art. III, para. 2).

[55] The Swiss Federal Criminal Court's judgement of 25 July 2012 appears to be consistent with this position, maintaining that a degree of immunity remains after the term of office has ended even while expressly stating that immunity *ratione personae* is temporary in nature (paras. 5.3.1 and 5.3.2).

77. In that regard, it should be noted, first, that immunity *ratione personae* is justified by the special position held by the persons who enjoy it; as the highest-level representatives of the State, they represent it in international relations automatically and without the need for any specific authorization and are automatically empowered to express the will and engage the responsibility of the State. In particular, this explains the special legal regime governing immunity *ratione personae*, which allows it to be invoked in respect of any act performed by a Head of State, Head of Government or Minister for Foreign Affairs and makes it neither possible nor necessary, for the purpose of granting them immunity, to establish the abstract nature of the act performed. In other words, the nature of the act performed by the person who enjoys immunity is irrelevant to the application of this legal institution. In addition, such immunity has a clear time limit that corresponds to the length of the term of office. Thereafter, the nature of the act performed once again becomes relevant: on the one hand, private acts performed by Heads of State, Heads of Government and ministers for foreign affairs are no longer protected by immunity and, on the other, official acts may be so protected but must first be identified as official acts.[56] This requires that an act be recognized as official before immunity can be granted, which is foreign to the very nature of immunity *ratione personae*; it is, however, one of the characteristics of immunity *ratione materiae*.

78. Therefore, in the event that immunity is invoked in respect of an official act performed by a former Head of State, Head of Government or minister for foreign affairs, that individual is presumed to enjoy a type of immunity *ratione materiae* that covers acts performed by State officials in the exercise of their functions, regardless of whether they were representing the State at the highest level at the time when the act was performed and irrespective of whether they had left office at the time when immunity was invoked. Thus, this is not a prolongation of immunity *ratione personae* or a residual enjoyment of any part thereof, but rather an application of the general rules governing immunity *ratione materiae*. Since the distinction between the two types of immunity from foreign criminal jurisdiction has been generally accepted, and since it is also accepted that the two types are governed in part by different legal regimes, the aforementioned distinction with regard to the types of immunity enjoyed by former Heads of State, Heads of Government and ministers for foreign affairs in respect of official acts performed while in office should be clearly established in the draft articles.

79. In light of the above, the following draft article, which takes the two aforementioned factors into account, is proposed:

Draft article 6
The temporal scope of immunity *ratione personae*

1. Immunity *ratione personae* is limited to the term of office of a Head of State, Head of Government or minister for foreign affairs and expires automatically when it ends.

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[56] In this respect, the International Law Institute, in its 2001 resolution, stated that a former Head of State "does [not] enjoy immunity from jurisdiction, in criminal (...) proceedings, except in respect of acts which are performed in the exercise of official functions and relate to the exercise thereof" (art. 13, para. 2).

2. The expiration of immunity *ratione personae* is without prejudice to the fact that a former Head of State, Head of Government or Minister for Foreign Affairs may, after leaving office, enjoy immunity *ratione materiae* in respect of official acts performed while in office.

VII. Future workplan

80. Following the workplan set out in her preliminary report, the Special Rapporteur proposes to devote her third report to a study of the normative elements of immunity *ratione materiae*, focusing primarily on two particularly complex issues: the terms "official" and "official act". This report, which will be submitted to the Commission at its sixty-sixth session, will also include draft articles on these issues.

81. The Special Rapporteur will then begin to consider the issue of exceptions to immunity with the intention of submitting some initial observations to the Commission at its sixty-sixth session.

Annex

Proposed draft articles

Part 1
Introduction

Draft article 1
Scope of the draft articles

Without prejudice to the provisions of draft article 2, these draft articles deal with the immunity of certain State officials from the exercise of criminal jurisdiction by another State.

Draft article 2
Immunities not included in the scope of the draft articles

The following are not included in the scope of the present draft articles:

(a) Criminal immunities granted in the context of diplomatic or consular relations or during or in connection with a special mission;

(b) Criminal immunities established in headquarters agreements or in treaties that govern diplomatic representation to international organizations or establish the privileges and immunities of international organizations and their officials or agents;

(c) Immunities established under other ad hoc international treaties;

(d) Any other immunities granted unilaterally by a State to the officials of another State, especially while they are in its territory.

Draft article 3
Definitions

For the purposes of the present draft articles:

(a) The term "criminal jurisdiction" means all of the forms of jurisdiction, processes, procedures and acts which, under the law of the State that purports to exercise jurisdiction, are needed in order for a court to establish and enforce individual criminal responsibility arising from the commission of an act established as a crime or misdemeanour under the applicable law of that State. For the purposes of the definition of the term "criminal jurisdiction", the basis of the State's competence to exercise jurisdiction is irrelevant;

(b) "Immunity from foreign criminal jurisdiction" means the protection from the exercise of criminal jurisdiction by the judges and courts of another State that is enjoyed by certain State officials;

(c) "Immunity *ratione personae*" means the immunity from foreign criminal jurisdiction that is enjoyed by certain State officials by virtue of their status in their State of nationality, which directly and automatically assigns them the function of representing the State in its international relations;

(d) "Immunity *ratione materiae*" means the immunity from foreign criminal jurisdiction that is enjoyed by State officials on the basis of the acts which they perform in the discharge of their mandate and which can be described as "official acts".

Part 2
Immunity *ratione personae*

Draft article 4
The subjective scope of immunity *ratione personae*

Heads of State, Heads of Government and ministers for foreign affairs enjoy immunity from the exercise of criminal jurisdiction by States of which they are not nationals.

Draft article 5
The material scope of immunity *ratione personae*

1. The immunity from foreign criminal jurisdiction that is enjoyed by Heads of State, Heads of Government and ministers for foreign affairs covers all acts, whether private or official, that are performed by such persons prior to or during their term of office.

2. Heads of State, Heads of Government and ministers for foreign affairs do not enjoy immunity *ratione personae* in respect of acts, whether private or official, that they perform after they have left office. This is understood to be without prejudice to other forms of immunity that such persons may enjoy in respect of official acts that they perform in a different capacity after they have left office.

Draft article 6
The temporal scope of immunity *ratione personae*

1. Immunity *ratione personae* is limited to the term of office of a Head of State, Head of Government or Minister for Foreign Affairs and ends automatically when it expires.

2. The expiration of immunity *ratione personae* is without prejudice to the fact that a former Head of State, Head of Government or Minister for Foreign Affairs may, after leaving office, enjoy immunity *ratione materiae* in respect of official acts performed while in office.